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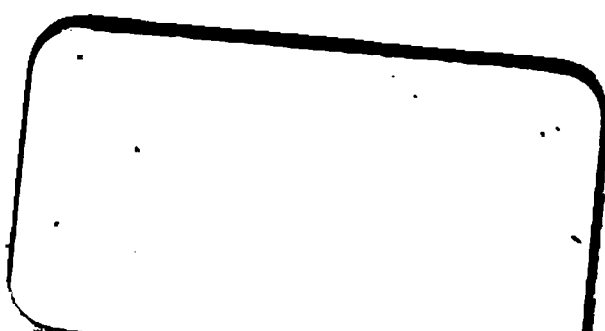
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REPORTS OF CASES
DECIDED IN
THE HOUSE OF LORDS,
UPON
APPEAL FROM SCOTLAND

FROM 1753 TO 1813.

V O L. III.

BY
THOMAS S. PATON, Esq.
ADVOCATE.

BEING THE CONTINUATION OF THE
REPORTS OF MESSRS. CRAIGIE AND STEWART.

EDINBURGH:
T. & T. CLARK, 38. GEORGE STREET.
LONDON: BENNING & CO.

MDCCCLIII.



LORD-CHANCELLORS.

LORD THURLOW, from 1778 to 1783.

SEALS in Commission from 2d April 1783 to 23d Dec. 1783.

LORD THURLOW, from Dec. 1783 to 1792.

LORD LOUGHBOROUGH, from Jan. 1793 to 1801.

LORD CHIEF JUSTICES OF ENGLAND.

LORD MANSFIELD, from 1756 to 1788.

LORD KENYON, from 1788 to 1806.

ATTORNEYS-GENERAL.

JOHN LEE, Esq.	- - - - -	1783 to 1789
SIR ARCHIBALD MACDONALD	- - - - -	1789 to 1790.
SIR JOHN SCOTT,	- - - - -	to 1801.

LORD PRESIDENTS OF THE COURT OF SESSION.

ROBERT DUNDAS, Esq.	- - - - -	1766 to 1788.
SIR THOMAS MILLER, Bart.	- - - - -	1788 to 1789.
SIR ILAY CAMPBELL, Bart.	- - - - -	1789 to 1808.

LORD JUSTICE-CLERKS.

SIR THOMAS MILLER, Bart.	- - - - -	1766 to 1788.
ROBERT M'QUEEN, Esq. of Braxfield,	- - - - -	1788 to 1799.

LORDS OF SESSION.

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LORD BALJARG, afterwards ALVA, (ERSKINE),	- - - - -	1761 to 1796.
LORD STONEFIELD, (CAMPBELL),	- - - - -	1763 to 1802.
LORD PITFOUR, (JAMES FERGUSON),	- - - - -	1764 to 1777.
LORD GARDENSTONE, (GARDEN),	- - - - -	1764 to 1793.
LORD KENNET, (BRUCE),	- - - - -	1764 to 1786.
LORD HAILES, (SIR DAVID DALRYMPLE, Bart.),	- - - - -	1766 to 1792.
LORD BARSKIMING (MILLER),	- - - - -	1766 to 1788.
LORD MONBODDO (BURNETT),	- - - - -	1767 to 1799.
LORD COVINGTON (ALEXANDER LOCKHART),	- - - - -	1775 to 1782.
LORD ANKERVILLE (D. ROSS),	- - - - -	1776 to 1805.
LORD BRAXFIELD (M'QUEEN,) afterwards LORD JUSTICE CLERK,	- - - - -	1776 to 1799.
LORD WESTHALL (D. DALRYMPLE),	- - - - -	1777 to 1784.
LORD ESKGROVE (RAE,) afterwards LORD JUSTICE CLERK,	- - - - -	1782 to 1804.
LORD SWINTON (SWINTON),	- - - - -	1782 to 1799.
LORD HENDERLAND (A. MURRAY),	- - - - -	1783 to 1795.
LORD ROCKVILLE (GORDON),	- - - - -	1784 to 1792.
LORD DUNSINNAN (SIR WILLIAM NAIRNE, Bart.),	- - - - -	1786 to 1809.
LORD DREGHORN (MACLAURIN)	- - - - -	1789 to 1797.
LORD ABERCROMBY (ABERCROMBY),	- - - - -	1792 to 1796.
LORD CRAIG (CRAIG),	- - - - -	1792 to 1813.
LORD POLKEMMET (BAILLIE),	- - - - -	1793 to 1811.
LORD METHVEN (SMYTHE),	- - - - -	1793 to 1806.
LORD GLENLEE (SIR WILLIAM MILLER, Bart.),	- - - - -	1795 to 1815.
LORD MEADOWBANK, (ALLAN M'CONOCHIE)	- - - - -	1796 to 1816.
LORD CULLEN (CULLEN)	- - - - -	1796 to 1811.
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CASES

DECIDED IN

THE HOUSE OF LORDS,

UPON APPEAL FROM

THE COURTS OF SCOTLAND.

<p>JAMES CARSE, the Younger of Blackhouse,</p> <p>HIS MAJESTY'S ADVOCATE and SOLICITOR</p> <p>GENERAL for Scotland, for the Public In-</p> <p>terest, and JOHN CORBET and JOHN</p> <p>COLQUHOUN, - - -</p>	<p><i>Appellant ;</i></p> <p style="font-size: 4em;">}</p>	<p><i>Respondents.</i></p>
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House of Lords, 26th July 1784.

APPEAL—COMPETENCY—JURISDICTION—WITNESS.—The Court of Session has a criminal jurisdiction vested in it to try certain crimes emerging in the course of any civil suit conducted before it. But their sentence, in such cases, is subject to appeal to the House of Lords. Appeal by a witness examined in a case, though not a party to the suit, sustained.

DISPUTES having arisen between the respondents, Corbet and Colquhoun, the appellant, along with Robert Gray, Esq., was induced, from motives of friendship, to become arbiter to settle their differences ; and, accordingly, both were appointed by the parties as arbiters, to settle “ all claims, “ controversies, and debateable matters whatever, subsist- “ ing between the parties, preceding that date,” and particularly, the subject matter of three actions depending in the Court of Session, at the instance of Colquhoun against Corbet, and also a process before the Sheriff of Dumbarton : And the parties agreed and bound themselves to abide by “ whatever the said arbiters, or, in case of their varying in “ opinion, whatever they, or either of them, with David

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&c.

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 ADVOCATE,
 &c.

“Muir, portioner of Garferry, hereby elected umpire or
 “oversman, shall give forth and pronounce as their final
 “sentence and decreet arbitral.”

The arbiters gave a final decree arbitral in the whole
 matters submitted to them; but this decree was brought
 under reduction, in an action raised for that purpose, on the
 ground of their giving decreet, on the footing that they had
 differed in opinion, and had therefore been under the ne-
 cessity of calling in the oversman, as provided by the refe-
 rence.

Dec. 17, 1783. The case being reported, the Court, before determining
 the question, ordered James Carse, one of the arbiters, to
 be examined on oath before the Lord Ordinary, upon the
 point of a difference of opinion, and he having been accord-
 ingly examined, and his deposition printed, the Lords resumed
 the consideration of the cause, and found, “That in respect
 “there was no written evidence that the arbiters had differed
 “in opinion, they reduced the said decreet arbitral.” Against
 this decree, Mr. Corbet petitioned the Court for an alteration.
 The Court, before answer, allowed the other arbiter, with
 the oversman, and the clerk to the submission, to be exa-
 mined upon oath, before the Lord Ordinary, upon the dif-
 ference in opinion of the two arbiters; and also upon the
 improper conduct of James Carse, the other arbiter, who
 had been formerly examined; and, upon advising this pe-
 tition, with answers for John Colquhoun, and the depositions
 so ordered, they “repelled the reasons of reduction of the
 “decreet arbitral quarrelled, assoilzied Mr. Corbet, and de-
 “cerned; and it appearing to the Court that James Carse,
 “in his deposition, had not told the truth, and had prevari-
 “cated, they granted a warrant to cite him to appear be-
 “fore them four days after such citation, and he having ap-
 “peared at the bar, upon Tuesday the 9th then current, the
 “Lords allowed him to be heard by counsel, upon the im-
 “port of the said deposition. And having, upon the 16th
 “day of December 1783 years, resumed the consideration of
 “the said deposition, with the other depositions taken in
 “the said cause; and also having heard counsel for the said
 “James Carse, upon the import of the said depositions, they
 “found, and hereby find the said James Carse guilty of gross
 “prevarication, and wilful concealment of the truth, in the
 “oath emitted by him in the said cause, and therefore or-
 “dained, and hereby ordain him to be carried from the bar
 “to the Tolbooth of Edinburgh, therein to remain until Wed-

“ nesday the 14th day of January next; on which day they
 “ decerned and ordained, and hereby decern and ordain the
 “ said James Carse to be carried to, and put upon the pillory,
 “ there to stand bareheaded for the space of one hour, from
 “ twelve at noon, to one o’clock afternoon, with a paper affixed
 “ upon his breast, with these words wrote in large characters,
 “ *gross prevaricator, and wilful concealer of the truth upon*
 “ *oath*; and thereafter to be dismissed; and they ordained,
 “ and hereby ordain the Magistrates of Edinburgh to see
 “ this sentence put into execution; and they also declared,
 “ and hereby declare the said James Carse infamous, and in-
 “ capable in all time coming, of bearing any public trust,
 “ or of being a witness in any action or cause; and ordained
 “ this sentence to be recorded in the books of sederunt, to
 “ the terror of others to commit the like crime in all time
 “ coming.” In virtue of this sentence the appellant was
 committed to prison.

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 &c.

In the meantime, he presented the present appeal of the sentence to the House of Lords, to which answers being lodged, it was objected, 1st, That such an appeal was incompetent, and, 2d, That it was further incompetent, as not being brought by a party in the cause, but by a witness found guilty of prevaricating.

Pleaded for the Appellant.—Upon the competency of the appeal. Before the Union, an appeal always lay to the Parliament of Scotland, from the sentence of the Court of Session. All the institutional writers agree in this, and make no distinction between the civil jurisdiction of the Court, and its incidental criminal jurisdiction. And in the Scots claim of rights, the broad right is conceded:—“ That
 “ it is the right and privilege of the subject to protest for
 “ remeid of law to the king and parliament, against
 “ sentences pronounced by the Lords of Session, provided
 “ the same do not stop execution of those sentences.” If therefore an appeal lay to Parliament before the Union, and if, as the appellant contends, this sentence is a sentence of the Court of Session, then it is clear that the present appeal is competent. Upon the merits;—it is equally clear, that although the Court of Session have a sort of criminal jurisdiction, which entitles it to punish perjury and prevarication upon oath, committed in the course of a depending action before them; yet, in such cases, *that* Court cannot, (as they have done in the present case) inflict the *pains of law*, that is, the punishment which the law in its rigour annexes

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&c.

to the commission of such crime upon a regular trial, and conviction in the proper criminal court; but must restrict their sentence to a slighter corporal punishment. There is no precedent for the Court's judging, as they have done here, and inflicting punishment for such crimes, under circumstances similar to those which occur in the present case. In all the instances that occur, it is of persons accused and tried at the instant upon their behaviour in the Court, or in consequence of what appeared in the face of their deposition, striking the judge at first view, or of collateral depositions, taken at the same time, when the accused had it in his power to command exculpatory evidence. But here the appellant was not accused of having prevaricated, or misbehaved; or done wrong in any shape, at the time of giving his evidence; on the contrary, when reflections were thrown out, the judge checked them as improper and unmerited. It was not until eleven months after, that the appellant was convicted upon the evidence of others, given with the view to contradict him, in a cause to which he was a stranger.—The appellant does not mean to say, that being suspected of a crime, he ought to have gone untried; what he contends for is, that the Court of Session ought to have remitted him to the Court of Justiciary, where he would have had the advantage of an indictment, and the opportunity of preparing his defence, and cross-examining those witnesses, Gray and Smith, who are said to have established the perjury against him. In denying him this mode of trial, and in depriving him of the benefit of exculpatory proof, *that* justice was denied him, which would have been accorded in the worst criminal proceeding.

After hearing counsel,

LORD CHANCELLOR THURLOW :—

“ MY LORDS,

“ The Lord Advocate, in answer to this appeal, at first, had pleaded that it was incompetent to appeal from such a sentence, though he has now given up that point at the bar of your Lordships' House. I have no doubt, that an appeal lay from every order of the Court of Session, and, without meaning any reflection, even think it unfortunate for the people of Scotland, that an appeal did not lie from the sentences of the Justiciary, as from the King's Bench in England. I do not approve of the conduct of the Court of Session, or the severity of their sentence in this case. No doubt, Carse appeared not to have spoken out the truth fully; but the im-

prisonment he had undergone was punishment sufficient ; and I therefore move your Lordships to affirm the sentence, so far as it directed Carse to be imprisoned for a month ; but to *reverse* so far as it directed him to be put on the pillory, &c. ; and so far as it declares him infamous and incapable of bearing public trust."

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Accordingly, it was

Ordered and adjudged that the two interlocutors complained of, in so far as they ordain James Carse to be carried from the bar to the tolbooth of Edinburgh, therein to be imprisoned, be affirmed. And it is further ordered, that the said interlocutors, so far as they ordain him to be put upon the pillory for one hour, with a paper fixed on his breast, denoting his crime, and the Magistrates to see the sentence put in execution, and so far as they declare him infamous and incapable of bearing public trust, &c., be *reversed*.

For Appellants, *J. Erksine, J. Anstruther*.

WILLIAM BRUCE, Late Shipmaster, Dundee, *Appellant* ;

ROBERT CLEGHORN & ALEXANDER CLEGHORN, Bakers in Leith, - - - } *Respondents*.

House of Lords, 2d March 1785.

SALE—TITLE—INCUMBRANCES—PRICE.—Circumstances held not sufficient to set aside and void the sale, although the missives on one side expressly declared, that unless the titles were found sufficient, the bargain then made was to be null and void. Also held, that the purchasers were not bound to pay the price until certain incumbrances were purged affecting the purchase.

Robert Johnston, proprietor of some houses in Leith, mortgaged them to William Petrie, and Helen Berrel, for two distinct and separate sums, amounting to £200. Johnston thereafter failed in business, and removed himself to London, whereupon two of his creditors adjudged the property, and entered into possession, by uplifting the rents of the same.

Some years thereafter, the appellant Bruce acquired, by purchase from Johnston, the right to this property, paying him at the time, £150 for the reversion, and the purchaser,

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on his part, undertaking to relieve the property of the adjudication affecting the same.

The appellant thereafter entered into possession, and let the principal part of the premises to the respondents, Messrs. Robert and Alexander Cleghorn. The latter gentleman proposed to purchase these premises, and the following writings were exchanged :—

Leith, 6th September, 1776.

“ Sir,

“ We hereby make offer of £350 Sterling, for
“ your whole subjects, back area, and office-houses belong-
“ ing thereto, lying in the Tolbooth Wynd here, £200 of
“ which we oblige ourselves to pay you at the term of Mar-
“ tinmas first, and £150 more at the term of Whitsunday
“ thereafter, being the full balance, your obliging yourself,
“ heirs and executors, to dispoise and deliver up to us all
“ your rights and titles to said subjects, with full warrandice,
“ and clear :—And if, upon examining your rights to said
“ subjects, they be found insufficient, both parties shall be
“ free, and the bargain made void and null. And in case
“ any debts or incumbrances shall appear which have not
“ been heard of, the bargain shall be also void and null, and
“ both parties free.

(Signed) “ ROBT. & ALEX. CLEGHORN.

“ To Mr. WILLIAM BRUCE,
late Shipmaster, Dundee.”

Sept. 6, 1776. To this letter of offer, the following answer was returned :

Leith, 6th September, 1776.

Gentlemen,

“ I except of your offer for my wholl subgiks in the Tol-
“ both Wynd hear, with the bak area, and office houses be-
“ longing thereto, namely, thrie hundred and fifty pounds
“ Sterling, two hundred of which to be paid me on order at
“ term of *Mertinmas* first, and one hundred and fifty pounds
“ Sterling at the next term of *Whedsondy* inshouing, being
“ the full balance. And I oblig myself, my heirs and ex-
“ ecutors, to give you up all my rights and titles to the said
“ subgiks, with full warrdice, clier at the term of *Mertinus*
“ first ; all the rent till *Mertinus* first to be payed to me.
“ As witness my hand.”

(Signed) “ WILLIAM BRUCE.”

“ To Messrs ROBT. & ALEX. CLEGHORN,
Bakers in Leith.”

It was stated by the respondents, that when the title deeds were sent him to be examined by his agent, instead of these proving to be a complete progress of title deeds, there was nothing but some *old memoranda* relating to the property, of no use or value. This was intimated to the appellant, who, in reply, demanded payment of the price, stating that they were bound to accept them, as sufficient title deeds, or give up the bargain.

Hearing that the appellant was anxious to give up the bargain, in consequence of having been offered a higher price for the property, the respondents brought the present action for implement of the same.

The appellant contended that the respondents wished to keep both the property and the price, and that, having given them all the title deeds in his possession, he had implemented his bargain under the missives. He also offered to complete the sale, by granting a disposition to them along with the progress of writs already in their hand; and if they did not consent so to accept these writs, he required them, in terms of the agreement, to give up the bargain, and send back the papers.

After some discussion, Lord Gardenstone, Ordinary, Aug. 5, 1777. pronounced this interlocutor, 9th Oct. 1776, "The Lord Ordinary having considered the minute of debate, finds "there is no ground for setting aside or voiding the bargain "of sale; and finds that the pursuers are not obliged to "pay the price even in part, until the extent of the incumbrances by adjudications are ascertained; nor in whole, "until the said incumbrance is purged or discharged, or "sufficient caution is found to that effect. And as it appears to the Lord Ordinary that the litigation has been "occasioned by an indirect attempt on the part of the defender (appellant) to set aside the purchase, finds the defender liable in expenses, and allows an account to be "given in." On representation, this judgment was adhered to by the Lord Ordinary.

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On reclaiming petition to the whole Lords, praying an alteration of the above judgment, the Court, of this date, Feb. 2, 1779. adhered, and refused the petition. A second petition met Feb. 18, 1779. Nov. 14, 1781. the same fate.

Against these judgments the present appeal is brought.

Pleaded by the Appellant.—1. That the letters above recited, expressing the terms of the bargain, are not sufficient in law to bind the parties. 2. That although they should

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be deemed sufficient in law, *locus penitentiæ* remains to either party, at any time before the bargain is completed, by disposition in proper form being executed. 3. That by the terms of the bargain the appellant was only bound to dispoise and deliver up to the respondents all such right and title to the said subjects as were then vested in him, and to guarantee such sale to be an absolute one, and a clear transfer of the property, subject to such demands as were already made on the estate, and specified in the proceedings at law, between the appellant as disposee, and the creditors of the said Robert Johnston. And, that the respondents cannot insist on the appellant purging such incumbrances as at the time of the sale affected the estate, and were so known to them; but, in case they are dissatisfied with either the appellant's title to the estate, or with the amount of the incumbrances, they may give up the bargain; the appellant being always ready and willing to allow them to embrace either alternative.

Pleaded for the Respondents.—1. The appellant has contended that the respondents are bound to pay the adjudication debts or incumbrances; but the price of £350 was all that the respondents undertook to pay, as the fair and full price of the subjects, and which sum was offered on condition of the latter being, “clear of every burden or incumbrance whatsoever.”—2. The appellant on his part, obliged himself and his heirs, to give up all *his* right and title to the property, with full warrandice and clear, at the term of Martinmas then first. Although, therefore, the respondents had paid up the whole price of three hundred and fifty pounds before the particulars of the debts came to their knowledge, they would have been entitled to the repetition of the amount of those debts upon the appellant's express warranty. Bruce the appellant, stands personally liable at this moment to account to the creditors adjudgers for the £230 he received as factor for them, under the order of the Sheriff of Edinburgh. The respondents are not liable to replace that money to Bruce, with whose factory intromissions they had no concern. If they be not liable to replace that money to the appellant, they cannot be liable in the payment of it to his creditors, and consequently the property which they have purchased for an adequate price, ought to be cleared of the incumbrance. And they are now willing, as they have all along been, to pay the balance coming to the appellant after paying those debts.

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After hearing counsel, it was
Ordered and adjudged that the interlocutors complained
of be, and the same are hereby affirmed.

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For Appellant, *Arthur Onslow*.
For Respondents, *Ilay Campbell*.

[Mor. p. 120.]

SIR JAMES NASMYTH, Bart. *Appellant ;*
JOHN SAMSON, Heir-at-Law of DAVID SAM- }
SON deceased, and JOHN AITKEN, } *Respondents.*

House of Lords, 4th April 1785.

ADJUDICATIONS—PENALTIES—*PLURIS PETITIO*.—Circumstances in which held, where the termly penalties due by a bond were included in the accumulated sum of an adjudication, that these formed a *pluris petitio*; and the adjudication so far objectionable as to reduce it to a security for payment of principal and interest in the bond.

Certain property, which originally belonged to John Porteous, having been adjudged by Sir James Nasmyth, and he having entered into possession in virtue of his adjudication, a judicial sale and ranking of the creditors was then brought. The estate was bought by Sir James Nasmyth, the principal creditor. Sixty years after the date of the adjudication, the heir of Porteous brought a challenge of the title in Samson's name. His chief grounds of challenge consisted in objections to the adjudications which grounded the judicial sale.

It was objected to the adjudication for the accumulated sum of £11,346. 13s. 4d. Scots led upon the debt *originally due* to Bertram of Nisbet, and assigned to Sir James Nasmyth, that the termly penalty of 100 merks for failure in payment of each half-year's interest contained in the bond, and adjudged for, being equal to one-third of the interest, was exorbitant, and therefore the adjudication ought not to be sustained; and that the other adjudication upon the same debt for £1480 Scots of interest was unnecessary; that interest being included in the first adjudication.

The Court pronounced this interlocutor:—"The Lords Nov. 20, 1763.
"sustain the objections to the first article in the state of
"the interests produced in the ranking, being an adjudica-
"tion at the instance of Sir James Nasmyth against the
"common debtor, for the accumulated sum of £11,346. 13s.

1785. " 4d. Scots, to the effect of striking off from that sum the
 NASMYTH " liquidated penalty and termly failures contained in the
 v. " bond adjudged for, and find that the adjudication can only
 SAMSON, &c. " subsist as a security for the principal sum contained in the
 " bond and interest due thereon, to be accumulated at the
 " date of the decret ; sustain the objection to the second
 " article in the state, being an adjudication at the instance
 " of Sir James Nasmyth against the common debtor for the
 " accumulated sum of £1480 Scots." On reclaiming peti-
 Mar. 20, 1784. tion the Court altered the interlocutor reclaimed against,
 and found " That the adjudication in question can only sub-
 " sist as a security for the principal sum and interest accu-
 " mulated at the date of decret of adjudication, and remit
 " to the Lord Ordinary to proceed accordingly." The ap-
 June 26, 1784. pellant presented another petition, but it was refused; and
 July 8, 1784. the case was therefore remitted to the Lord Ordinary to
 proceed and determine therein.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—1. There is no ground in equity, and therefore it would require very clear grounds in law to deprive the appellant of the moderate penalty in question stipulated in his bond, and adjudged for upwards of sixty years ago; and the appellant judicially offered to show, by calculation, that the very loss he sustained by want of payment of the interest upon the debts due to him by his debtor, is greatly more than the amount of this penalty. The respondent declined the calculation. The creditor, therefore, is not desiring any undue advantage of the debtor, while the latter's heir, at the distance of sixty years, endeavours to take the advantage of legal niceties against him. One purpose and object of the penalty for nonpayment, is to answer the damage and inconvenience of lying out of the money. Another is, to answer the expense of recovering it. The appellant and his predecessor have been at great expense, but if the penalty be cut off these must be lost. 2. In law there was no *pluris petitio* or charge more than was legally due. The adjudication was taken precisely in terms of the personal obligation in the bond on which it was founded. By that bond the debtor had become bound to pay principal, interest, penalty, and termly penalties to the full extent of the sum adjudged for. Every shilling, therefore, was legally due; and supposing that either part or the whole of the termly penalties could afterwards be restricted by a court of equity, that does not infer any illegal over-

charge or *pluris petitio* in the prior adjudication. The creditor could not possibly adjudge otherwise than in terms of the obligation granted by the debtor, nor regulate himself by any restriction not yet made. The excess being cut off by equity, the adjudication should stand as to the remainder, just as if part of the accumulated sum had been paid. In the Court below, it was stated by the respondent that the termly penalties were referable to heritable security only, and could not be adjudged for under the personal obligation in the bond. This seems to have moved the Court, and led them to think that the termly penalties were not *in obligatione*. But when the fact and the law, as applicable to that fact, are fully explained and understood, the objection must at once disappear, because it is manifest that the termly penalties were contained under the personal obligation, and properly adjudged for in virtue thereof. An heritable bond consists of two parts, a personal obligation and a real right of levying payment out of the lands; an ordinary adjudication may be led for all that is contained in the personal obligation and no more. An adjudication of a peculiar nature following upon a decret of poinding the ground, may be taken for what can be levied in virtue of the real right. The real right is often confined to the annual rent or interest, which being also in the personal obligation, adjudications of both these kinds may be led for it. Termly penalties are sometimes only in the real right, and not in the personal obligation, and thus cannot be adjudged for in an ordinary adjudication, not being *in obligatione*; and if adjudged for there is a *pluris petitio*, more being adjudged for than the debtor had bound himself to pay. Such was the case of *Park v. Craig* in 1771. Sometimes the termly penalties are both in the personal obligation and in the real right; sometimes they are in the personal obligation and not in the real right, which is the present case, and in such case they not only may but must be adjudged for by an ordinary adjudication, and cannot be recovered otherwise. 3. Not one adjudged case has been pointed out where the Court, in the case of any excess in the stipulated penalties, went farther than to cut off that excess. On the contrary, in all former cases, where the question has occurred, the adjudication has been sustained for principal, annual rent, and ordinary penalty, cutting off only any excess or exorbitance in the stipulated penalty. The case of *Park v. Craig*, 16th Nov. 1771, referred to by the respondent, can be no precedent here, because the termly penalties

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in that case were not on the personal obligation. And there was no poinding of the ground. In short, it was quite different in its circumstances, yet the adjudication, even in that case, notwithstanding all the objections stated to it, was sustained as a security, not only for principal and annual rent, but also for necessary charges. 4. Even in the case of a real *pluris petitio*, or overcharge of more than is due by the obligation of the debtor, the effect of that, both according to the nature of adjudications, and the practice for more than half a century past, is not to void the adjudication totally, but only to restrict it to what is fairly due, deducting the overcharge. Penalties are due, not only in law but in equity, and it would, therefore, be a hardship if the adjudication were not to stand good as to the sums to which no exception is taken.

Pleaded for the Respondents.—1. Adjudications, like other diligence, are, in their nature, indivisible. When a creditor seizes the effects or estate of his debtor, by a rigorous process of the law, he must be prepared to show, not only that every step is regular, but that the precise sum demanded is due by law. It is not sufficient for him to say, that a part was indisputably due, and he will hold the diligence as for one *part* only. An adjudication is, in law, a transfer of the estate of the debtor to the creditor, in satisfaction of the debt mentioned in it;—if that debt was not due, in the strictest and most entire sense, there is no transfer,—the whole proceeding is nought, and the creditor has himself to blame. Upon these principles, which will be found laid down by every authority, any irregularity or overcharge in the adjudication does, in strict law, void it altogether; but the Court of Session, in exercise of its equitable powers, has been in the practice, where the irregularity or overcharge is not gross, to sustain the adjudication challenged, as a security to the creditor for what is due in equity. Sitting as a Court of equity, they will not cut down a just debt on account of informality or mistake, in a process which the creditor has relied on for securing his payment; but neither will they decree payment of penalties, which the creditor has no title to but by law, and in consequence of observing all the forms, and keeping within the bounds of strict law in the process. Accordingly, in the present case, the Court has given the appellant his principal and the interest thereof accumulating, or converting both into a principal at the date of the adjudication, with the legal interest of the sum then accumula-

ted from that day; but, judging that there was an error and overcharge in the adjudication, they have denied him the penalties. The only question then is, Whether there was an overcharge or *pluris petitio*, by including in the accumulated sum of the adjudication £466. 13s. 4d., as penalties or termly failures, incurred by nonpayment of the interest or annual rent. And it will not escape observation, that the appellant has decided this against himself, for from the beginning he has admitted, that the adjudication could only *stand* as a *security*, and argues the question, as to the extent to which that adjudication, as a security, should stand. He even confesses that the termly failures or penalties were too large, and that they ought not to have exceeded a fifth-part of the sum due for interest, and beseeches the Court to restrict it accordingly. It follows that his claim is not *at law* but *in equity*, and from equity he cannot demand a legal penalty. 2. Apart altogether from these admissions, penalties for nonpayment of interest cannot enter an adjudication. General adjudications, like the present, stand precisely on the footing of the old apprisings. By the common law, the creditor had a right to apprise for the penalty, but *that* meant only the penalty annexed to the nonpayment of the debt. As there could be no charge of interest before the Reformation, neither could there be a penalty for not paying interest. Since the Reformation, there is no statute authorizing such an exaction, nor is there a single *dictum* in the law books to give countenance to it. It is owing entirely to the error of conveyancers, that termly failzies are stipulated in personal obligations, which, in modern practice, accompany real securities; and the short of the error is this, while the taking of interest directly was prohibited, the usual mode of securing money in Scotland was by grant of an annual rent, of the nature of a perpetual rent charge out of lands, redeemable by the debtor on payment of the sum borrowed. The creditor could not avowedly demand his principal; his only way of compelling payment indirectly was, by entering on the lands, and apprising them for the annual rent.—When the doctrines of the Canon law had lost their force, it became usual to insert in the grant, a personal obligation by the debtor to pay the annual rent regularly, under penalty for each term's failure. Finally, the mode which prevails at this day was adopted, of the debtor's granting a personal bond or obligation for the sum borrowed, payable at a certain time, with the interest, under

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1785. a penalty; and, in aid of the personal, a real security was granted by the same instrument, and then conveyancers, without attending to the alteration or change of circumstances, kept up the form of annexing penalties to the non-payment of the interest, while they also annexed their penalty to the nonpayment of the debt in general. 3d, But further, acting upon those principles, and dealing with it as an error, the Court of Session have refused to sustain action for penalties, when they are included in the accumulated sum of apprising and adjudications, and have, in all cases, considered it as a *pluris petitio*, sufficient to destroy the diligence in law, and to restrict it to a security in equity. And several decisions support this proposition, *Orrock v. Morrice*, Stair, 29th Nov. 1677; *Craig v. Park*, 15th Nov. 1771, and other cases.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellant, *Alex. Wight, Wm. Adam.*

For Respondents, *Ilay Campbell, Ar. Macdonald.*

JOHN STEWART & Co. Merchants, Greenock, *Appellants*;
JOHN DUNLOP & Others, Merchants, Glasgow, *Respondents*.

House of Lords, 8th April 1785.

INSURANCE.—Circumstances in which presumed knowledge and concealment of arrival of news of the capture of the vessel insured, before the insurance was effected, held to vacate the policy.

The appellants, merchants in Greenock, had been trying to effect an insurance on their ship *Peggy*, and cargo, for her voyage from St. John's, Newfoundland, to St. Lucia, but had not succeeded in doing so at the premium offered, 15 guineas per cent., until the West India mail arrived, which brought accounts that the French fleet had made an attack upon the island of St. Lucia in the month of May preceding, and had taken the island of Tobago, and that Barbadoes was threatened. This news appeared in the newspapers and Lloyd's List, but no accounts reached the appellants.

This made them more anxious to insure, and they were in correspondence with a house in Liverpool to effect that object; when Mr. Stewart went to Glasgow on the 15th Aug., and having consulted with an insurance broker, effected an insurance on ship and cargo for £2400, at 20 guineas per cent. premium. It turned out, that on the day previously, a ship (Henrietta) had arrived at Greenock from Halifax, which brought news of the capture of the Peggy. It was admitted by the appellant, that he was aware of this arrival, —at least that he had seen the vessel in the roads that afternoon (14th Aug.); but she having come from Halifax, a distance of some hundred miles from St. John's, and having no concern with her, he did not make inquiries, and that it was not known for some days after that she brought any such news. But, on the contrary, he stated he went to Glasgow on the 15th August, in ignorance of any such, and effected the insurance in *bona fide*. He left Glasgow for Paisley, and slept there all night, and did not arrive in Greenock until the 16th inst., when he, for the first time, heard of the capture.

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The underwriters refused to pay the sum insured, and action was raised for that purpose, and counter action by the insurers, to have the policy set aside, on the ground of fraud, and because, as the Henrietta had arrived from Halifax at Greenock, on the 13th August, with one of the crew of the Peggy on board, bearing the accounts of the capture of that vessel, the news thereof was publicly known in Greenock a day or two before the date of the insurance; and, therefore, the said John Stewart must be presumed to have known the same.

The Judge Admiral, before whom the actions were brought, after proof was taken of these facts, gave judgment in favour of the appellants; whereupon the underwriters brought a reduction of his decree before the Court of Session.

The Court pronounced this interlocutor, “ Find facts and circumstances proven sufficient to instruct that the insurance made by John Stewart upon the ship the Peggy, her freight and cargo, upon the 15th August 1751, would not have been made, if the brigantine Henrietta had not arrived in the road of Greenock upon the day preceding, and brought intelligence that the above mentioned ship had been taken; and find that the said John Stewart & Co. have no claim whatever against John Dunlop and the

Jan. 23, 1784.

1785. " other underwriters, upon the brigantine Peggy, her freight
 ——— " and cargo, for payment of the sums underwritten, and in-
 STEWART, &C. " sured by them respectively, upon the policy of insurance
 v. " libelled, and therefore sustain the reasons of the said ad-
 DUNLOP, &C. " miralty decret challenged." On reclaiming petition the
 Feb. 11, 1784. Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded by the Appellants.—The *onus probandi* that the appellant Stewart knew of the capture at the time he effected the insurance, lies on the underwriters. They sue to vacate the policy on this ground, which is no less a ground than fraud, and they must make good their assertions. The matter is too serious to the appellants, both on this account, and the magnitude of the interests at stake, to admit of presumptions, and to be influenced by anything but direct proof. When the proof is examined, there is no direct evidence adduced, to prove Mr. Stewart's previous knowledge of the capture of the Peggy. The underwriters endeavour to infer his knowledge from circumstances, but, in considering these circumstances, distinction must be taken between facts, which only amount to suspicion, and a series of facts so connected together, as to admit only of one conclusion; but there is nothing of the latter kind here. It is only proved, that a report of the capture of the ship was known to five persons in Greenock on the 14th August, but these witnesses expressly depone, that they had no intercourse or communication, directly or indirectly, with the appellants.

Pleaded for the Respondents.—Intelligence of the capture of the Peggy was, before the insurance was effected, matter of public notoriety in the town of Innerkip, which is within four miles of Greenock, and the place of John Stewart's residence. It was also known to the captain and crew of the Henrietta, who brought it, all of whom had easy access to the owner, Mr. Stewart, and the reason of its not being publicly talked of was, owing to the precautions taken by Mr. Boog, Mr. Stewart's friend, from all which, as well as the written letter not sent, but prepared to be sent to Liverpool, offering the 20 guineas premium, without waiting a reply to his previous letter to the same party, offering less premium. The legal presumption was, that Mr. Stewart was in the knowledge of the capture of his vessel. Besides, it was clear that a hint of the capture had been communicated to Walkinshaw, Stewart's confidential friend and brother-in-law,

and a meeting had thereupon taken place, whereupon the insurance was resolved on. It is impossible for Stewart to separate himself from these parties, and being in the knowledge of a fact, which they fraudulently concealed, the insurers were grossly deceived in the matter, and the policy consequently was annulled.

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After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of, be affirmed.

For Appellants, *Tho. Erskine, Al. Wight.*

For Respondents, *Ilay Campbell, Wm. Adams.*

NOTE.—Unreported in Court of Session.

[M. 11,283.]

Mrs. MARTHA GROVE and Others, Creditors of the York Buildings Company, SIR JAMES GRANT of Grant,	}	<i>Appellants ;</i> <i>Respondent.</i>
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House of Lords, 15th April 1785.

PRESCRIPTION—INTERRUPTION—SUMMONS—PARTIES CALLED.—

The York Buildings Company had purchased the wood on the respondent's estate, and the greater quantity was delivered, when they became bankrupt. Having lodged a claim on their estate, it was objected to the claim, that the contract had undergone the long negative prescription, and that the summons, decree, and horning following thereon were inept, and, therefore, incapable of interrupting prescription, because the summons did not call the Company as a corporate body, in which name it was appointed to sue and be sued, by act of Parliament. Held, by the Court of Session, that these were sufficient to interrupt prescription. In the House of Lords reversed, without prejudice to the points decided, but with special remit to consider whether the contract as to the wood be now at this time in force, and the Company liable therefor.

The York Buildings Company having purchased from the respondent a quantity of trees, they granted, of this date, a Jan. 5, 1728. bond for the price, amounting to £7000, payable in certain instalments, and at certain intervals and under a penalty, all specified in the contract of sale entered into and subscribed by the parties.

1785. The wood was to be cut to the extent of 60,000 trees;
 ——— and only at times as it was required. Before the whole
 GROVE, &c. was cut, and only 5000 under the contract taken, the Com-
 v. pany became bankrupt.
 GRANT.

In 1780 a ranking and sale was brought of their estates, and Sir James Grant, a creditor under the above bond, lodged a claim, upon which he had raised diligence, and had, Mar. 2, 1780. of this date, obtained adjudication. It was objected to this claim, that more than 40 years having elapsed from the date of the contract of sale, &c. the same was prescribed. Answer: Prescription was interrupted, by action raised in 1735 against the Company, and decree in absence obtained in 1736: Also horning raised thereon and charge given in 1740; and finally adjudication in 1780. Reply: The summons and decree and horning following thereon were not effectual to interrupt prescription, because the bond being granted by Hosey and Ewer for behoof of the Governors and Company of the York Buildings Company, the summons, instead of calling these parties, or calling the company, it “ called as defenders “ *John Ashley, Esq., present governor* “ of the York Buildings Company, John Nicol, William Jack- “ son, George Abel, Gilbert de Flures, *Richard Fowler*, and “ Charles Portales, present Court of Assistants and Directors “ of said company, *for themselves, and as representing the* “ *whole proprietors of the said company.*”—And decree having gone out against the same parties, horning was raised, and charge given under the same description of parties.

The decree of constitution, 1736, therefore, not calling the company, by their incorporate firm, in which, by act of Parliament, they were appointed to sue and be sued, and not calling even the two partners, Hosey and Ewer, who signed the bond for behoof of the company, the same was void and null, and the horning following thereon, in 1740, was also inept on the same ground, and also because, when executed, of this date, these gentlemen were not in office, and no longer *the present* Governor and Directors; as by the constitution of the company, they had retired from office and given place to others: so that the whole proceedings being inept, were inoperative to interrupt prescription.

July 21, 1784. The Court, of this date, found “ that the decree of con- “ stitution at the late Sir James Grant’s instance, with the “ horning and execution following thereon, sufficiently in- “ terrupt the negative prescription, and therefore repel the “ objection made to the interest produced and claimed by

“ the present Sir James Grant, and remit to the Lord Ordinary to proceed accordingly.” On reclaiming petition the Court adhered; and, in terms of the remit, the Lord Ordinary found “ the present Sir James Grant a just and lawful creditor to the York Buildings Company, for the several accumulated sums contained in his adjudication, and interest thereon mentioned, bygone and in time coming, and ordaining him to be ranked among the creditors of the said Company in his proper place.”

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Nov. 24, 1784.
Dec. 20, —

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The contract on which the respondent founds his claim being prescribed, he is not entitled to be ranked as a creditor, unless he can show that the prescription has been interrupted by some legal document taken within 40 years. The decree in 1736 was not a good decree, nor the horning a good horning, because the summons, which was the foundation of both, did not call the company by its corporate name—the name in which, by the act constituting it a corporation, it was authorized to sue and be sued. They entered into the contract in their corporate name; and though the bond is founded on in the summons, yet the parties who signed that bond for behalf of the company are not even called. Further, the horning was specially inept, because it was raised, and the charge on it given in 1740, against the same directors as named in the decree of 1736, when these parties had ceased to be directors, and even after some of them were dead. As, therefore, the corporate firm was not charged, nor included in the horning, there was no proper or legal warrant for diligence to charge any one partner more than another, or to charge the new directors; or to charge the old as present directors, after they had ceased to be so. The proper course undoubtedly was, to call the corporate firm, and then, under this general name, to have presented a bill to the bill chamber for letters of horning, stating the change of directors, and craving horning to go out against the new directors in room of the old. The whole procedure, therefore, being inept, could form no interruption of prescription.

Pleaded for Respondent.—In citing the governor and assistants of the York Buildings Company who were in office at the date of the summons and decree in 1736, the company or corporate body were in effect duly called. And, consequently, if they were properly cited by the summons, they were regularly condemned by the decree, and charged

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 —————
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 v.
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by the horning, because the decree conforms in all respects to the summons, and the horning to the decree. The summons having called certain individuals of the company, decree could not go out against any other than those in the summons; nor could the horning proceeding on that decree go out against any other than those against whom the decree was pronounced. But even supposing the charge given to these old directors were exceptionable, still, by the law of Scotland, prescription would be interrupted by such irregular or informal charge; for, as the negative prescription is a presumption of payment, and as a judicial proceeding by summons, decree, and diligence totally negatives that presumption, any objection to the diligence or procedure in point of form, cannot destroy the evidence which negatives that presumption; besides, it is clear that Sir James Grant *did not intend* to give an informal charge, but a charge such as would enforce payment; so that, in so far as evidence of his intention to abandon or give up the debt is concerned, an irregular charge is just as strong a proof of a contrary intention, as a regular charge could possibly be; and therefore the presumption of payment or abandonment cannot hold; and the plea of prescription is therefore out of the question. While, on the other hand, charging any of the parties liable as proprietors, was sufficient to keep the claim open against the whole.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be *reversed*, without prejudice to the points therein decided. And further ordered that the case be remitted back to the Court of Session in Scotland to inquire “Whether any contract in question between the Governor and Co. of Undertakers for raising the Thames Water in York Buildings and the late Sir James Grant, be at this time subsisting in force, or the said corporation in any manner chargeable thereupon.” And it is further ordered, That the said Court of Session do proceed thereupon, and upon the rest of the cause hereby remitted, according to justice.

For the Appellants, *Ar. Macdonald, Alex. Wight.*

For the Respondent, *Ilay Campbell, William Grant.*

Note.—In Morison it is stated, “It is believed the suit was afterwards compromised.”

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ROB. ROBB, WILLIAM MILLER, Senior, and }
 GEORGE ROBB, Burgesses of the Burgh } *Appellants*;
 of Anstruther Wester, - - - }
 WILLIAM THOMPSON and Others, the Magis- }
 trates and Councillors of the said Burgh, } *Respondents*.

ROBB, &c.
 v.
 THOMPSON,
 &c.

House of Lords, 26th April 1785.

BURGH ELECTION—COMPETENCY OF SUIT.—Held that burgesses, not being also councillors of the burgh, were not entitled to carry on a suit to set aside the election of the magistrates and town councillors of the burgh.

This was an action brought to set aside the election of the Magistrates and Councillors of the burgh of Anstruther Wester. The appellants appeared as the only pursuers in the action; and they being burgesses merely and not councillors of the burgh, the following objections were stated to the competency of the suit at their instance. 1. That the appellants were not constituent members of council, and therefore could bring no action to reduce any election, not having any interest in the same; and, 2. That supposing it competent to them to bring the action, yet as the same was not brought within two months of the election complained of, they were barred by the statutes of the 7 and 16 Geo. II. The Lord Ordinary (17th Feb. 1785) pronounced this inter-locutor, “ Finds, that the action of reduction was incompetent to the pursuers (appellants). That they had no right to carry on the same; and therefore assoilzies the defenders (respondents) so far as regarded the reasons of reduction, reserving to the pursuers (appellants) to insist in their declarator, and to amend their libel, if they shall be so advised.” On representation the Lord Ordinary adhered. From these two interlocutors of the Lord Ordinary the present appeal was brought; but the House of Lords dismissed the appeal, and affirmed with costs.

For the Appellants, *Ilay Campbell, W. Grant.*

For the Respondents, *Alex. Wight, W. Adams.*

NOTE.—Another appeal, involving the same point, came on from the burgh of Kilrenny, but counsel appeared and asked to withdraw it; parties having compromised the suit. It was withdrawn accordingly.

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[Mor. p. 1888.]

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&c.
v.
TENANT, &c.

ANDREW JOHNSTON and Others, Magistrates
and Councillors of the Burgh of Anstru-
ther Easter, - - - - - } *Appellants;*

ALEX. TENANT and WILLIAM GRAY, Senior
constituent Members of the Town Coun-
cil of the said Burgh at Michaelmas Elec-
tion 1784, - - - - - } *Respondents.*

House of Lords, 28th April 1785.

BURGH ELECTION.—Held by the Court of Session, that non-resident
burgesses of the burgh, were not eligible to be elected councillors
or magistrates of the burgh, but reversed in the House of Lords.

This was a question as to the validity of an election of the
Magistrates and Town Council of Anstruther. It was ob-
jected, that Sir John Anstruther, Philip Anstruther, and John
Anstruther, and Gavin Hogg, Sir John's butler, were not qua-
lified, nor legally elected councillors, in respect they were
non-resident burgesses of the burgh.

Feb. 25, 1785. The Court of Session pronounced this interlocutor: " Re-
pel the objection made to the service of the complaint
upon John Anstruther, Esq. of Lincoln's Inn, and find
the service on him sufficient: Find that the magistrates
of the said burgh of Anstruther Easter, and those put
upon the leet for bailies, ought to be resident in the
said burgh, and sustain the objection that the said
John Anstruther, Esq. was non-resident when put upon
the leet for bailie, at the annual election on the 14th
day of September last, and was thereby incapable of
being elected a bailie; and reduce the election of the ma-
gistrates and town councillors made for the said burgh at
said election; and decern and declare accordingly. And
find the respondents liable in full costs of suit to the com-
plainers, of which decerns an account to be given in."

Against this interlocutor the present appeal was brought
to the House of Lords.

After hearing counsel, it was

Ordered and adjudged that the interlocutor complained
of be reversed (*ex parte*).*

For Appellants, *Alex. Wight, Wm. Adam.*

For Respondents, *Ilay Campbell, W. Grant.*

* Note.— *Vide* next case.

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SIR HECTOR MUNRO, Provost, and other Members of the Town Council of Nairn,	} <i>Appellants;</i>	MUNRO, &c.
FORBES and Others, Burgesses of Nairn,		FORBES, &c.
	<i>Respondents.</i>	

House of Lords, 3d May 1785.

BURGH—ELECTION OF MAGISTRATES.—Held, that in the election of the Magistrates of a burgh, the Provost and other Councillors need not be resident burgesses, or inhabitants of the burgh, but that the bailies and office bearers, in the burgh of Nairn, must be chosen from amongst the burgesses resident. Also held, that the town clerk of the burgh is incapable of holding said office, and at same time of holding the office of one of the magistrates of the said burgh.

This question arose as to the right of non-residents to be elected to the magistracy of the burgh of Nairn.

The ancient charter of the burgh was lost: but the number of councillors, as far back as the records went, varied from 13 to 19.

The respondents, the burgesses, having objected to the introduction of country gentlemen, and others not residing in the burgh, into the magistracy and council, brought the present action of declarator, to have it found that the provost, magistrates, and whole councillors ought to be elected from among the burgesses, inhabitants of the burgh, and that the town clerk was not entitled to hold that office, and also the office of bailie.

After proof of the usage, the Court of Session “found, (21st July 1784), That by the constitution of the burgh of
“ Nairn the council thereof must consist of a provost, three
“ bailies, dean of guild, a treasurer, and nine councillors:
“ Find and declare, that it is not necessary that the provost
“ be a resident burgess; but find and declare, that the three
“ bailies, the dean of guild, and the treasurer, must all be re-
“ siding burgesses; and of the nine councillors, at least six
“ must always be residing burgesses: And find and declare,
“ that the town clerk, or any person officiating as his depute,
“ must be a notary public, and that he shall be incapable of
“ being elected a member of the council of the said burgh in
“ any capacity during his continuance in the office of town
“ clerk or deputy: Find, that the expense of the defence laid
“ out by the defenders in the cause, must be paid by the de-

1785. "fenders themselves, and cannot be laid on the funds of the
 ——— "said burgh : Find the defenders conjunctly and severally lia-
 MUNRO, &c. "ble to the pursuers in the expense of extract ; find no
 v.
 FORBES, &c. "other expense due, and decern."

Against this judgment the present appeal was brought.

Pleaded for the Appellants.—1. That the Court of Session has no jurisdiction or power to make or model the set of a burgh, as in the present case. 2. That the Court had gone out of the action, in ascertaining the number of the council, as there was no such conclusion in the libel. 3. That there was no law requiring the councillors of a burgh to be resident, and the current of decisions was the other way ; and 4. That the judgment, in so far as it declared that of the nine councillors, there must be six resident within the burgh, had no foundation in law or usage, or in any thing but expediency, which it does not belong to a court of justice to proceed upon. 5. That *that* part of the judgment which finds that the expense must be paid by the defenders themselves, and not out of the funds of the burgh, is quite irregular, and foreign to the present action, which had no such conclusion ; and it is contended that none of the appellantsought to be subjected to pay either the costs of the burgh, or that part of the costs which the decree awards, because, as guardians of the rights of the burgh, they were bound to defend the action, which they had not done improperly or groundlessly.

Pleaded for the Respondents.—The essence of the constitution of a royal burgh is, that it should be governed by its own members, residing within the burgh, as appears by the common law, and various acts of Parliament. The *Leges Burgorum*, § 77, require that the bailies should be chosen of "the faithful men, and of gude fame, be the common consent of the honest men of the burgh."—The act 1487 requires "That the election of officers in burghs shall be of "the best and worthiest *indwellers of the town*," and the act 1535 is to the same effect. The appellants say that these acts are in disuse, and, 2dly, that they only applied to office-bearers such as bailies, &c. and not to the remaining councillors ; but these acts were never repealed, and have not become obsolete. Although the ancient charter of the burgh be lost, yet it is clearly established by usage, that the practice for the last century has been, to elect the provost, bailies, dean of guild, and treasurer, from among the resident burgesses. The propriety of this itself is so obvious, as to be admitted by the appellants. They did not object to this as to

the bailies, the dean of guild, and treasurer, nor to the part of the interlocutor as to the clerk, and yet they have appealed generally.

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After hearing counsel,

LORD CHANCELLOR THURLOW said:—

“ MY LORDS,

“ The first thing which struck me was, the amazing difference between the conclusions of the libel and the judgment. I had directed the counsel to speak to the power of the Court thus to wander; and from the admission of both sides, assumed it as a clear proposition, that in all actions, the Court is confined to the matter submitted by the libel.” (He then entered into an examination of the evidence of the usage in the burgh, and said,) “ If it had been proved that it had been the custom to elect councillors from amongst the residing burgesses only, he would have proceeded on this as the law of the burgh; and if there had been very few exceptions, he might have considered that as an abuse; but the instances are numerous and constant of electing non-residents. The question then comes to be, What is the general law? I see no evidence that, from the nature of the office, residence is essential. There is no statute. The train of the decisions establishes, that residence is not a necessary qualification as a councillor. It is said that a provost need not reside, and it would seem to follow, that much less need the councillors. The Court of Session, in this case, have found it impossible to lay it down generally, that councillors must reside; but, without any rule, except ideas of expediency, they have declared, that a certain number of the councillors in this burgh, short of the total number, ought to be residents. If the Court had a *discretionary* power, bordering on a legislative one, to regulate the set of burghs, even then, I would have varied the judgment, for that discretion should have led them to require the *whole* councillors to be resident; but I cannot find that the law had clothed the Court of Session with any such power. Lord Kilkerran, one of their number, in reporting the case of Wick, complains bitterly of their assuming it. In that case, the Court went far indeed; they laid down a new qualification, viz. having property in the burgh, without law, and without evidence of the custom.

“ I therefore move to amend the decree, by leaving out all that related to the numbers of the different members, as not put in issue by the summons; and by inserting, that the Court finds that the bailies, dean of guild, and treasurer, must be chosen from amongst the burgesses resident.”

It was therefore ordered and adjudged, that the interlocutors of 10th July 1784 be affirmed, with the following variations, leave out after the words (they find that), all

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the words of the interlocutor, to the words (and find and declare), and instead thereof insert (that the bailies and office-bearers of the said burgh of Nairn, in all time coming, ought to be elected and chosen from among the real and resident burgesses thereof; but they do not find, that such residence is a necessary qualification of the persons to be elected provost or other councillors of the said burgh, except the magistrates aforesaid); leave out the words (town clerk), and instead thereof, insert (common clerk of the said burgh); leave out after the words (incapable of) the words (being elected a member of the council of the said burgh, in any capacity during his continuance in the office of town clerk or deputy), and instead thereof, insert (holding the said office of common clerk, and, at the sametime, of holding the office of one of the magistrates of the said burgh.

For the Appellants, *Ilay Campbell, J. Anstruther.*
For the Respondents, *T. Erskine, Alex. Wight.*

MRS. HELEN DOUGLAS, Spouse of JAMES BAILLIE of Olivebank, and Him for his in- terest, - - - - -	}	<i>Appellants;</i>
MRS. ELIZABETH CHALMERS, Widow of the deceased ARCHIBALD SCOTT, Surgeon in Musselburgh, - - - - -	}	<i>Respondent.</i>

House of Lords, 6th May 1785.

VERITAS CONVICTI—RELEVANCY OF DO.—DEFAMATION.—In an action of damages brought for defamation of character, where the *veritas convicti* was pleaded in defence, but chiefly founded on rumours and reports of *mala fama*. Held, that this was irrevelant to go to proof, and a special condescendence ordered of the particular acts. A condescendence having been given in, it was objected to it, that it was too general, vague, and indefinite in its terms,—that it did not set forth any specific act of adultery, which was the crime with which the pursuer had been defamed. The objection was sustained to the effect of ordering the defenders to give in a more articulate condescendence of the several facts they offered to prove, as well as the time and place, and a list of witnesses by whom they meant to

prove such articles. On appeal, this interlocutor was adhered to in the House of Lords. 1785.

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This was an action of damages, raised at the instance of the respondent, before the Commissaries, for defamation of character, against Mrs. Baillie, the appellant. The defence stated by the latter was the *veritas convicii*, grounding her allegations upon the general rumour, report, and bad name entertained of her within the town of Musselburgh.

A long discussion took place before the Commissaries, as to the relevancy of such statements to go to proof; it being objected, that there was no relevancy in the offer to prove public report and common fame; but that a condescendence of special facts must be given in, and of such special facts as parties can join issue in. The Commissaries held the July 17, 1783. *defences irrelevant*; and ordered a proof of the pursuer's libel. The case was then brought before the Court of Session by bill of advocacy, in which the appellant contended, that as the (pursuer) respondent had stated in her libel, as a quality of the offence charged against the appellant, that it was committed against a person who had maintained a virtuous reputation, and as this went to the very issues of the charge, it was necessary that the appellant should be allowed to traverse that material part of the libel, by proving the reports and common belief of the respondent's having no reputation to lose. Lord Monbodo reported the case to the Lords, and, upon their instructions, refused the bill of Aug. 9, 1783. advocacy.

The appellant was then forced to give in a condescendence of the special facts upon which she grounded her defence. The condescendence set forth, that "the pursuer, Mrs. Scott, "had carnal dealings with a man or men, different from her "husband, at different times, and in different places, in each "of the years, from the year 1750 to the year 1770, both "years inclusive; and upon all, or one or other of the days "or nights of these years, within her own house in Mussel- "burgh; and the house and garden in Fisherrow, sometime "belonging to her uncle, George Chalmers, writer to the "signet deceased; the park called Pinkie Park, and in other "houses and places in and about the city of Edinburgh, "towns of Leith, Musselburgh, Fisherrow, and Dalkeith, "and the towns of Perth and Dunkeld, and that neighbour- "hood. 2. That during the period above mentioned, the "pursuer and a man or men, different from her husband,

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“ were frequently seen at unseasonable hours, in solitary and
 “ unfrequented places, in suspect postures. 3. That the
 “ pursuer, during the foresaid space, was frequently in the
 “ use of travelling in a chaise, or other carriage, with a man,
 “ different from her husband, by themselves, in the night
 “ time, as well as in the day ; on many of these occasions,
 “ she frequently used to sit privately in the carriage, with
 “ the blinds drawn up, while that carriage waited for the
 “ said man, at the place where he was dining out, and in
 “ this situation she would sit for hours together. And
 “ thereafter she would have travelled to the country with
 “ said man, at very unseasonable hours, and frequently very
 “ much flustered with liquor. 4. That upon account of
 “ Mrs. Scott’s improper behaviour in the particulars above
 “ stated, not only the relations of her husband, but many of
 “ her own blood relations gave up either visiting or receiving
 “ visits from her, not only during that period, but ever since.
 “ That upon one or other of the nights of the period above men-
 “ tioned, the sign post or board, belonging to an ale-seller
 “ in the town of Musselburgh or Fisherrow, of the name of
 “ Horn, and upon which, in allusion to his name, was paint-
 “ ed a pair of horns, was removed from the ale-house, and
 “ placed at the door of the house of Mr. Scott, the pursuer’s
 “ husband. Lastly, That during the period above mentioned,
 “ the conduct of the pursuer was so improper, as to render
 “ her and her gallants not only the general topic of conver-
 “ sation, and the subject of songs, but the just offence of all
 “ the virtuous part of the neighbourhood in which she
 “ lived.”

The case having again come before the Commissaries upon
 this condescendence and offer of proof, they found “ the
 June 7, 1784. “ proof offered irrelevant, and refused the same.” On advo-
 cation of this interlocutor, Lord Braxfield refused the bill ;
 and on reclaiming petition to the whole Lords, the Court,
 after full discussion, “ ordained the appellants (defenders)
 “ to give in a more distinct and articulate condescendence
 “ of the several facts they offer to prove, and a list of the
 “ witnesses by whom they mean to prove each article to be
 “ condescended on.”

A condescendence was then given of the special acts, ac-
 companied with the names of such witnesses as had then
 come to her knowledge.

After some discussion on the condescendence, and par-
 ticularly on the necessity of condescending on the names of

the witnesses; and also of confining the proof to such charges as could be established by eye witnesses; the Court finally found “ the defence offered of a *veritas convicii* “ competent in this cause to exculpate or alleviate, and re- “ mit to the Lord Ordinary to refuse the bill of advocacy, “ and remit to the Commissaries, with this instruction, “ that they allow the defenders a proof of the following “ articles by the witnesses, specially condescended on for “ proving the same, or by such other witnesses in the list “ annexed to their condescendence, as in the course of the “ proof may appear material.” (Here followed the parti- cular articles specified with reference to person, time and place, the latitude as to time being ten weeks before and ten weeks after the particular acts). On reclaiming petition the Court adhered.

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Mar. 10, 1785.

Against these interlocutors the present appeal was brought to the house of Lords.

Pleaded for the Appellant.—1. The respondent’s libel expressly sets forth as an aggravation, and indeed the very *essence* of the offence charged against the appellant, that “ Defaming and calumniating any person or persons in their “ good name, character, and reputation, giving them and “ their families opprobrious and reproachful names and epi- “ thets, tending not only to lessen their esteem and respect “ in the opinion of all their neighbours and acquaintances, “ but also to disturb the quiet and peace of such persons in “ their families at home, by being hurtful to, and inconsis- “ ent with the connection of husband and wife, are crimes “ of a most atrocious and heinous nature, and by law se- “ verely punishable; and more especially, when such crimes “ are committed against persons who have maintained a “ virtuous reputation.” The libel also sets forth, “ That “ the expressions used by the appellant were *false*, injurious, “ and defamatory, and that the appellant did otherwise in- “ sult and defame and scandalize the respondent.” The amount of the charge therefore is, that the stories alleged to have been mentioned by the appellant to the respondent’s prejudice, were not only false, but malicious, invented, devised, and circulated by the appellant with a malicious intention to deprive the respondent of an unblemished fame and reputation, which she formerly possessed; the two facts upon which the relevancy of the respondent’s libel entirely depends, are her own unblemished fame and reputation, and the appellant having been the malicious inventor of the

1785. reports to her prejudice. The Court of Session, after much
 ——— litigation, found the necessity of allowing a proof of the re-
 DOUGLAS, &c. spondent having actually been guilty of adultery, because if
 v. that were proved, the libel would fall to the ground; but a
 CHALMERS. proof of the existence of general report and universal belief
 of the respondent having been thus guilty, will equally tra-
 verse the libel, in so far as it proceeds upon the averment of
 her having been of unblemished fame and reputation. It
 will also completely exculpate the appellant from the charge
 of having invented and circulated the stories to her
 prejudice, and ought therefore to have been allowed.
 2. But the Court of Session not only refused a proof of
 the respondent's bad fame and reputation, but also of va-
 rious covert acts of reproach against her by numbers of per-
 sons in the town of Musselburgh and neighbourhood, for a
 long tract of years, evincing in the clearest manner, not
 only their general opinion of respondent's character, but
 their knowledge of particular irregularities in her conduct,
 their strong sense of which they demonstrated by the pas-
 quinades, songs, and other public insults specified in 9, 10,
 11, 12, 13, and end of the 14 articles of the condescendence.
 They have also refused a proof of the general *mala fama*, and
 of the conduct of the public in general, as evincing the same,
 but have also denied the appellant a proof that the respon-
 dent's husband's relations, and her own nearest connections
 in blood, did, on account of her improper conduct alone,
 renounce her society; a circumstance which goes further
 than to establish a general *mala fama*, and affords a strong
 degree of circumstantial evidence of the respondent's actual
 guilt, which the appellant ought not to be precluded from
 adducing in support of the proof she has been allowed to
 bring on that point. 3. Although the Court of Session has
 allowed a proof of certain specific facts, in order to fix the
 guilt of adultery on the respondent, yet they have refused
 the appellant a proof of *various circumstances* contained in
 all or most of the articles of the condescendence, which,
 though perhaps not sufficient for this purpose, when taken
 by themselves, would, as links of the general chain of evi-
 dence, be of infinite importance in the proof of the *veritas*
convicii allowed to the appellant, and which being wanting,
 must necessarily tend to weaken the proof she expects to
 bring upon that head, which, like every other proof of
 the same nature, must be in a great measure circumstantial.
 Besides, the proof which the Court of Session has allowed of

the *veritas convicii*, is so restricted and hampered by limitations in point of time and place, as to lead to the concealment of those facts, which it must have been the object of the Court to expiscate. The Court has restricted the proof of each of the facts to a period of five months, which restriction is contrary to law, because the appellant's legal defence being, that the respondent was guilty at any time within the general period specified in her condescendence, and specially at certain periods within that time, though beyond the five months, the natural consequence is, to cut her off from proof of those latter specific charges. 4. The interlocutors are also unprecedented, in so far as they allow the special articles admitted to proof, to be proved only by witnesses condescended on for proving the same, or by such other witnesses in the list annexed to the condescendence, as in the course of the proof may appear material. It may, and probably will happen, that many of the witnesses in the list may be discovered by the appellant to be material for proving particular articles, which they are not condescended on for proving; yet, in such an event, the appellant will be barred from taking any benefit by their evidence, unless, which may not happen, some of the other witnesses to that particular article, shall by their testimony bring out something to prove the evidence of such witness to be material. This restriction, besides subjecting the appellant to the risk of losing material evidence, will involve the parties in endless litigation, as it cannot be expected they will agree in what is requisite to make another witness material. And the restriction further excludes her from adducing witnesses who may emerge in the course of the proof, simply because they are not in the list given in.

Pleaded for the Respondent.—1. Because the appellant's first plea in defence, that she only repeated what she had heard from common report, was most justly repelled by the Court as irrelevant; and the proof offered that there were reports unfavourable to the respondent's character was properly refused. Such evidence must ever be contradictory and unsatisfactory, and it would be a disgrace to any court of justice to hear it. It can be no justification of a slanderer that other persons were equally guilty: besides, the charge against the appellant is not her having said that she had heard from others, or the common fame did so and so report the respondent, but that she roundly asserted facts most injurious and defamatory, as if they had consisted of

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her own knowledge. 2. Because the proof allowed of the *veritas convicii*, most properly limited to the special articles in the appellant's condescendence, and the latitude taken of ten weeks prior and ten weeks posterior to the days she has, after the fullest time for inquiry, fixed upon as the date of the criminal acts alleged, surely does not afford room for complaint on the part of the appellant. And the whole strain of these articles being inserted simply to afford colourable pretext for the other charges, and seemingly inserted, not from actual information, but from common report, idle tales, and frivolous circumstances, it was quite proper in the Court not to admit them to proof. 3. It is certainly necessary and proper that the respondent should be apprised of the witnesses by whose evidence it is proposed to establish so heavy a charge against her. The limitation to the persons named as witnesses in the condescendence is just, and agreeable to the constant practice of the Court. Proofs at large are never allowed, and in support of general pleas or defences. It will indeed be evident that, the appellant did not limit herself in the condescendence, but mentioned every person she imagined could aid her, or know any thing of the respondent, when she made out a list of no less than 158 persons; and she has not yet assigned a reason for wishing to add to that list. 4. But if she has any further evidence to lead, it will be quite competent for her, under the reservation in the interlocutor, to move the Court to allow proof of other articles.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed.

For the Appellants, *T. Erskine, Alex. Wight.*

For the Respondent, *Ilay Campbell, Wm. Adam.*

WM. CAMPBELL, Esq. of Shawfield,	.	<i>Appellant;</i>
JOHN WELSH, Esq., and Others, Creditors of	}	<i>Respondents.</i>
the York Buildings Company,		

House of Lords, 11th May 1785.

BANKRUPTCY—RANKING OF CREDITORS—LANDLORD AND TENANT—
 RETENTION OF RENT.—A tenant had a lease of the estate

of Kilsyth for 99 years, at a rent of £500 per annum. The tenant afterwards became creditor of the landlord to a large amount, £7282 of his debt being heritably secured over the estate on bond, which bore an express clause entitling the tenant to retain the tack duty. The other debts were secured by adjudication; and he contended, on the bankruptcy of the landlord, that he was entitled to retain the rent, in the first place, to pay the interest of his whole debts, and then to extinguish the principal. Held in the Court of Session, that he was entitled to retain the rents for the payment of the interest and principal of the £7282 heritable bond, but not for the other debts. Reversed in the House of Lords; and held that the tenant was entitled to retain and impute the rents, in the first place to pay the interest, and in the second place, the principal of the whole debts due to the appellant as are preferable to the debts due to such creditors.

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The York Buildings Company, who had acquired all the forfeited estates in Scotland, granted to the appellant's grandfather, David Campbell, Esq. of Shawfield, a lease of the estate of Kilsyth for 99 years, for a tack duty of £500 per annum.

Soon thereafter David Campbell became a creditor of the York Buildings Company in several sums of money advanced by him to them, amounting in all to a sum of £10,000. In particular, £7282 of this sum was secured by heritable bond, of this date, over the estate of Kilsyth. The bond having this clause, "that he and his foresaids shall be allowed, and are hereby allowed, to retain the said tack duty in their own hands from Whitsunday 1732, or in all time coming, during thenot payment, in payment, *protanto* of the sums of money, principal, annual rents, and necessary expenses." Besides this heritable bond, Mr. Campbell was obliged, as security for the Company, to pay a bank debt of £1500, accumulated with interest to £1900, on which he raised adjudication in the following year. He had also to interpose to pay a debt against the Company, due to Lady Bute, on which adjudication was led in 1735, whereupon he obtained assignation to that adjudication. He likewise acquired right from John Sommerville to an adjudication which had been taken by him against the Company in November 1733, for the sum of £552.

The Company never paid any part of these debts, principal or interest, to Mr. Campbell or his representatives. On the other hand, they had been paid no rent for the lease of the estate of Kilsyth, but had allowed Campbell to retain

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the whole. In the meantime, the Company became bankrupt, and having reference to the manner in which the appellant was to account to the Company's creditors for these rents, the question was, Whether the appellant had a right, as he contended, to set off against this demand for rents, the whole debts acquired by and due to his grandfather, with interest; or whether, as was contended by the creditors, he should account for these rents as a fund to be divided among the Company creditors, after allowing for the preferable heritable bond?

The Company being engaged in extensive schemes, found occasion for large supplies of money; and having obtained an Act of Parliament, empowering them to sell and grant annuities or rent charges by way of lottery, they issued transferable annuity bonds to the amount of £10,403. 11s. upon the security of their estates, and, to render such security effectual, they granted a disposition in Oct. 1727 in favour of trustees for said annuitants. This was the first real security granted over their estates.

Upon the disposition to the estates, of date October 1727, the annuity creditors were only infeft 14th March 1729, so that the infeftment was subsequent to that of Mr. Campbell.

In 1737, the annuity creditors brought an action to set aside the above lease, which was afterwards dropped; and it was alleged, in this and other proceedings in the Court among the creditors, that Mr. Campbell did not claim a preference beyond his bond debt, and did not seek a right to retain the rents except for it.

Of the same date, 1728, with the heritable bond of £7282, the Company granted to Sir John Meres, an heritable bond over their *whole estates*, including Kilsyth, for a debt due to him upon which he was infeft, but subsequent to Mr. Campbell's infeftment.

The Company, having occasion to borrow more money, granted in 1731 a trust disposition, conveying their whole estates to trustees, in security of £100,000, for behoof of their creditors; and infeftment followed thereon on various dates, from 4th November 1732 to January 1735. These were called the trustees for the bond creditors.

1732. The Duke of Norfolk adjudged the whole estates in Scotland on 10th November 1732, for payment of an arrear of tack duty of £2025, on a security of a yearly tack duty of £3600 per annum.

Nov. 10, 1732. The Duke of Norfolk's adjudication was thus first led, but

the appellant's first adjudication and it were completed by charter and sasine on the *same date*, viz. 19th January 1734. The appellant's *third* adjudication, viz. of Sommerville's debt, acquired by Campbell, was led on 7th November 1733; and there were no other adjudications within a year and a day of the Duke of Norfolk's, which was the leading adjudication. Several adjudications, however, were led during the year 1734, and of course prior to the appellant's second adjudication, consisting of Lady Bute's debt of £1848, which was not taken until Feb. 1735.

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Nov. 7, 1733.

Feb. 1735.

Mr. Campbell's claims against the Company thus exceeded £10,000, and, consequently, the annual interest due him was above £500, being the yearly rent paid by him. The appellant therefore claimed right to retain the tack duty or rent of £500 per annum, in the first place, towards extinction of the interest of this whole debt, and, in the next place, towards extinction of the principal sums.

It thus appeared, with regard to Mr. Campbell's bank debt, on which adjudication was only obtained in 1773, that the following creditors were preferable, 1st, The Trustees for the Annuitants; 2d, Sir John Meres; 3d, The Duke of Norfolk and Partners; and 4th, The Trustees for the Bond Creditors. It was also alleged, that certain other creditors were likewise preferable, in consequence of their adjudications, inhibitions, and other diligence, viz. Bertram of Nisbet, whose inhibition was recorded 18th August 1721; Rowland Ainsworth, by inhibition, recorded 2 February 1727. And there were four creditors whose adjudications were within a year and a day of Shawfield's first adjudication, and entitled to come in *pari passu* with him.

Before the present question was raised, Sir John Mere's debt was paid; so was the Duke of Norfolk's debt. The trust-deed creditors were also paid; and the annuity creditors were otherwise provided for. The question lay therefore between the appellant and what were called the postponed creditors of the Company.

It seemed admitted by the creditors, that the heritable bond for £7282 was a preferable debt; but in regard to the three adjudication debts, they contended that these were not preferable, and therefore he was bound to apply the rents exclusively to that bond debt, to the extinction of interest and principal, leaving the principal and interest of his other debts to stand over.

The Court pronounced this interlocutor, "Find, That in

1785. " the present case, Walter Campbell of Shawfield, is bound
 ——— " to impute his tack duties termly to the payment of the
 CAMPBELL " interest on the heritable bond for £7282, 5s. 9d. sterling ;
 v. " and to impute termly any excess of tack duties to the pay-
 WELSH, &c. Dec. 7, 1780. " ment of the principal sum in the said heritable bond ; and
 " after the extinction and payment of the heritable bond,
 " find, That the tack duties are a fund *in medio* to be divided
 " among the creditors of the York Building's Company,
 " according to their respective preferences, and remit to the
 " Lord Ordinary to proceed accordingly." On reclaiming
 Feb. 4, 1785. petition the Court adhered.

Against this interlocutor the present appeal was brought, in so far as it did not allow him also to retain the rents or tack duty, against the other debt of £3000 secured preferably, in so far as the present postponed creditors were concerned.

Pleaded for the Appellant.—It seems admitted that this is a question between the postponed creditors of the Company, (that is, creditors not equal in time or rank with the appellant,) and the appellant, and there is no pretence that postponed creditors can maintain any plea against the appellant, that it could not be competent for the Company itself to maintain. Thus then, for the engagements which Campbell came under for the Company,—which he soon thereafter had to pay for the Company, and upon which he was secured by adjudication, as well as for the £7284 heritable bond, he is entitled to retain his rents, and to set them off against the interest of the *whole* debts due to him. There was no covenant in the lease to pay interest for the rents after the periodical terms of payment, and the process which the law permitted to found a demand of interest, was never followed. The appellant might therefore maintain, that he is entitled to charge against the Company the whole debts in his person, with interest, and to give allowance only for the rents, without interest, at the commencement of this action. But as the rents were not demanded, or were allowed to remain in his hands, he admits that they must in equity be stated against him annually, if applied to the whole debts, but, upon the principles of law and justice, he submits, that the respondents cannot be heard to insist that the rents shall be applied to one debt, so as gradually to extinguish it, principal and interest, while the other debts remain entire, and the growing interest on them is dead stock, when all the debts are precisely on the same footing as between the ap-

pellant and respondents, who are creditors postponed to him. The interest on his whole debts therefore, must compensate with the rents; and if there is a surplus over, that surplus must go to extinguish the principal of the debts least secured. The respondents say no; because there is an exception to the general rule, arising from the circumstances of this case, viz. 1st, Mr. Campbell, as to the bond debt, agreed that the rents were to be applied periodically to extinguish principal and interest on that debt. 2. That he did actually apply the rents in this manner, and consequently the mortgaged debt was discharged, and cannot now be reared up. But it is a mistake to say both that Mr. Campbell agreed to apply the rents first to principal and interest of the heritable bond; and that he did so apply them, for there was no such agreement, and, of course, no such application. And it does not follow, from the clause in the bond, that the appellant is prevented from retaining the rents for the whole debts *in general*. This was the understanding of the parties at the time, and proved by the circumstances of the Company, and had Mr. Campbell understood otherwise, he would not certainly have allowed the adjudication debts to lie over so long, but would have secured them at once. He is therefore entitled to retain for these as well as for the heritable bond of £7284.

Pleaded for the Respondents.—The mode of accounting for the rents of Kilsyth, as fixed by the Court below, is not only just, but agreeable to the understanding and covenant of the parties. It has been proved, that the appellant's ancestor agreed with Sir John Meres and the Company, to take an assignment of a preferable debt, for the purpose of being let in to the possession of the rents of the estate. That Sir John Meres, to accommodate him, was induced to give up the hold he had of this estate. That Shawfield could otherwise have had no title to the possession. That he succeeded likewise in getting the Company's corroborative or collateral security, giving special power to retain the rents, to be applied towards extinction of principal and interest of this debt. That Shawfield had no other debts in his person at the time. That the retention, therefore, could apply solely to this debt, and he was bound to apply the whole rents accordingly. That the other creditors so understood the matter, and, for 30 years, allowed him to apply the rents accordingly. And in a former suit, it was not only admitted, but settled, that the retention applied to the heritable bond

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 ———
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debt solely. The appellant cannot therefore now be allowed to claim retention on other debts subsequently in his person. His title of possession of these rents was, the heritable bond alone, and he cannot ascribe that possession afterwards to a different title ; and now, after the extinction of the heritable bond and interest, claim retention on the other debts acquired, which were not ranked on the same footing. He was bound therefore by special paction, to apply these rents, in the first place, to the extinction of principal and interest on the heritable bond.

After hearing counsel,

LORD CHANCELLOR THURLOW :—

“ MY LORDS,

“ This is an appeal from certain interlocutors of the Court of Session, (stated the interlocutors of 7th December 1780 and 4th February 1785). And the appellant's complaint is, that these interlocutors have laid down an improper rule of accounting.

“ To avoid the mentioning fractions of sums and circumstances, which have no influence on the question, I shall suppose the following case :—A person possessed of an estate under lease to a tenant for £500 rent, owes, 1st, to the tenant A. £2000 ; 2d, to B., a stranger, £2000 ; 3d, to the said A., the tenant, another £2000 ; and that these debts are, by the diligence of the respective creditors, preferable in the above order. The tenant A. is entitled to retain his rent, and apply it to payment of his first debt £2000 and interest. In something less than five years the debt will be discharged. The stranger B. is then entitled to have the rents paid over to him, his debt then amounting, with interest, to £2500. It will take more than five years of the rents to discharge this debt. When it is fully paid, the tenant comes again to hold the rents. The tenant says to the landlord, ‘ It is true, in competition with the stranger B., I could only found upon my first debt, and in accounting that way it was exhausted, but in competition with you, I will state myself as creditor for both my debts, and I will impute the rents first to pay the interest of both, before encroaching upon the principal of either. The landlord says, you did in fact hold only for your first debt,—it is paid, and you are now to go upon your second. The question is, What ought to be the rule ?

“ In the cases, a great deal is said with respect to the creditors who were preferable or *pari passu* with Shawfield ; but it is unnecessary, because it is confessed in the minute, and was at the bar, that the postponed creditors are the only parties. 2d, No doubt the counsel for respondents does not admit this, and it shall be guarded. But at present, the appellant may be stated as preferable to all the other creditors not paid. And the question is, Mr. Campbell being allowed

to possess or retain the rents, can he impute them to all his debts, or must he impute them in payment only to the heritable debt?

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“ There arises two questions—

CAMPBELL

“ 1. What is the general rule of law?

v.

“ 2. Whether there was any agreement, or were any circumstances to take this case out of the general rule?

WELSH, &c.

“ On the 1st,—It is plain that Shawfield, as tenant, was not obliged to pay any rent to the Company, while he was creditor of the Company. The rents were just equivalent to pay the interest of those debts, and consequently were sunk, and he is creditor still for his principal.

“ On the 2d,—First as to circumstances. It is contended that the annuitants were preferable to Shawfield's adjudications; and in a process in which they were the parties, it was said that Shawfield stood first only for his heritable debt, and that the annuitants were next entitled to the rent when that debt was paid. It is of no consequence in the present case, what was said in that process, because it only went to rule in competition with creditors entitled to a priority.

“ In the proceedings on the bill of suspension 1761, the heritable debt was declared *extinguished*, that expression is not to be understood literally or generally, but *secundum subjectam materiam*. It was a question with the annuitants,—they are out of the field or paid,—and notwithstanding that decree, Mr. Campbell continued to retain, as against the Company and its postponed creditors. Can a concession of the party, or a declaration of the Court in that cause, operate in favour of persons who were not parties? It was declared in the process of reduction, that they could not, by finding the annuitants only entitled to plead the *res judicata*.

“ No case and no principle of law has been stated to show that the postponed creditors, claiming under the Company, can have a right to plead against Shawfield, what the Company itself could not plead. On the contrary, and in competition with them as in a question with the Company, Shawfield is entitled, in point of law, to bring all his debts to set off against the rents.

“ The clause in the heritable bond was an unnecessary one. It professed only to do what the law would have done without declaration. The respondents want to make it an obligation upon Shawfield, to apply the rents to payment of the heritable debt singly or preferably. Consequently, to let all his other debts lie over with interest unpaid. It is impossible to imply an obligation in this way; it would have required other and more express words than are here to make out such an obligation.

“ No consent of Shawfield's, to impute in the way the respondents contend, is to be found in the proceedings. On the contrary, he claimed, and was allowed to retain, for other debts than the heritable bond.

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v.

MORE.

" I therefore move to reverse the interlocutors, and declare that Shawfield is entitled to retain the tack duty, and impute the same ; 1st, In payment of the interest of all his debts ; and then, in payment of the principal thereof in competition with creditors not preferable to any of the said debts."

It was ordered and adjudged that the interlocutors of 7th December 1780, and 4th February 1785 complained of in the appeal, be reversed. And it is further ordered and adjudged that the appellant, in account with the York Buildings Co. and their postponed creditors, has a liberty to retain and impute the tack duty of £500, in the first place to pay the interest, and, in the second place, the principal of all such debts due to the appellant as are preferable to the debts due to such creditors.

For Appellant, *Ilay Campbell, W. Grant.*

For Respondents, *Ar. Macdonald, Alex. Wight.*

NOTE.—Unreported in Court of Session.

JANET M'INNES, Widow of CAPTAIN FAIR-	}	<i>Appellant ;</i>
BAIRN, late of the Sixty-second Regi-		
ment, - - - - -		
ALEX. MORE, - - - - -		<i>Respondent.</i>

House of Lords, 23d May 1785.

CONSTITUTION OF MARRIAGE—Held, that though a party joins issue, and goes to proof and final judgment, on one fact of her condescence, that she is not foreclosed, on failure in making out the issue, from going to further proof of the other facts and circumstances of her condescence. So held in a declarator of marriage.

The particulars of this case are reported, *ante* p. 598, Vol. II.

The appellant, in attempting to make out her marriage, grounded her case, both in the libel and subsequent condescence given in for her, on a written acknowledgment, which she alleged was sufficient proof to establish a valid marriage between them ; and the House of Lords having reversed the judgments of the Court of Session, which found such acknowledgment sufficient, and ordered that the Court of Session do remit to the Commissaries to find that such written acknowledgment was not sufficient proof of any

marriage having passed between the parties, the case was remitted accordingly.

When the case came before the Commissaries, an interlocutor, in terms of the judgment of the House of Lords, was then pronounced, whereupon the appellant again, by a reclaiming petition, raised the question, on a new ground of law, insisting that she was entitled to a proof of *all facts and circumstances* tending to support the other grounds of her libel, and that she was prepared to prove and establish a constructive marriage. After some discussion, a condescendence was ordered. The condescendence was given in, but it appearing to be almost entirely founded on the letter already adjudicated upon, the Commissaries rejected the proof offered. On reclaiming petition to the Court, their Lordships allowed her a proof of her condescendence, and in general of all facts and circumstances in support of the libel. In contending for this result, she stated, that as she had been misled by the Commissaries and by the Court of Session, who had decided that the *written acknowledgment was sufficient*, she was restrained from going into a proof of all facts and circumstances constituting a marriage between them in general terms. In answer, the respondent stated, that having been allowed a proof of whatever *facts and circumstances* she thought proper to insist on for establishing this alleged marriage, she was cut off from going into any new proof. The parties had joined issue, and the appellant chose to rest her cause upon the evidence of the letter, together with what appeared from the mutual declarations of the parties. She in effect renounced all other proofs, and agreed that the cause should be determined upon that issue alone. Nothing therefore was omitted *per incuriam*. She stated in substance the facts she now states, and having betaken herself to a certain mode of proof, and waived all further proofs, the question cannot be raised again. Besides, in the civil law, after a party had concluded on taking a proof, he was not on any account allowed any further proofs, as appears from Novel, 115, cap. ii. In Scotland, when an act is once pronounced, whether of *litiscontestatio*, or before answer, and a proof closed, the parties cannot be allowed to propone new facts and allegations, which is expressly provided by the Act of Sederunt, 23 July 1674.

The Court adhered to their former interlocutors.

These interlocutors the appellant brought under appeal to the House of Lords, but their Lordships

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v.
MORE.

Nov. 24, 1783.

Jan. 21, 1784.
Feb. 10, 1785.

1785. Ordered and adjudged that the appeal be dismissed, and
 the interlocutors complained of be affirmed.
 YOUNG
 r.
 BROWN, &c. For Appellant, *B. W. Macleod, John Mackenzie.*
 For Respondent, *Ilay Campbell, Sylv. Douglas.*

ALEX. YOUNG, a Linen Printer, - Appellant;
 MESSRS. BROWN and Company, Merchants, } Respondents.
 Glasgow, - - - - -

House of Lords, 7th June 1785.

CONTRACT—APPRENTICE.—An apprentice having bound himself to one Company, and his services, on its dissolution, having been transferred to another Company. Held, by the terms of his agreement he was bound to serve the new Company.

The appellant, Alexander Young, by articles of indenture, dated April 1781, engaged himself as apprentice to *Messrs. Macalpine, Fleming, and Company*, merchants in Glasgow, binding himself “to serve the said concern of *Macalpine, Fleming, and Company*, at their printfield of Dalquharn, or the subsisting partners of the said concern, who may carry on the business, or their managers for the time being, &c.

The appellant entered on the duties of his apprenticeship, and continued therein until, as was alleged, the whole partners came to the resolution of dissolving the company, which they did, by a minute signed by them, dated Nov. 1784, in the following terms:—

“ We unanimously resolve and agree to dissolve the partnership, and it is hereby dissolved accordingly; and we hereby order our affairs with all convenient dispatch, to be brought into as narrow a compass as possible; the goods and effects of the company to be disposed of, and the company’s debts to be paid off with all expedition. And we further resolve that the dissolution shall be advertised in London Gazette, and the Edinburgh and Glasgow Papers.”

After the dissolution of the concern in this manner, some of the partners of the old concern resolved to form a new Company, which was done under the social name of *Messrs. Brown and Company*.

The question was, having been engaged as apprentice to *Macalpine, Fleming and Company*, and that company having been dissolved, Whether the appellant was bound to serve a different company altogether; namely, the respondents *Messrs. Brown and Company*?

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v.
BROWN, &c.

The appellant contended, that it was no answer to him to say, that some of the partners of the old concern were partners in the new partnership, because it was manifest that before such new partnership was formed, the old concern had ceased to exist. The new concern, therefore, was a totally different concern altogether, and there being no power to transfer his services, and he having bound himself to *Macalpine, Fleming and Company* alone, *Messrs. Brown and Company* had no power to force him to serve them. It was answered for *Brown and Company*, That the concern of *Macalpine, Fleming and Company* subsisted in the same way as when the articles with the appellant were entered into, except that the firms had been changed; and, moreover, by express contract the appellant bound himself "to serve the company, and the subsisting members thereof carrying on the business." Only one member retired from the concern, and his share having been bought up by the remaining partners, the concern continued and subsisted under the remaining partners carrying on the business.

The appellant's bill of suspension was refused by the Lord Ordinary (Hailes); and, on petition to the Court, the Lords adhered. Feb. 24, 1785.
Mar. 5, 1785.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors be affirmed with £100 costs.

For Appellant, *Edward Bearcroft, W. Adam.*

For Respondents, *Ilay Campbell, J. Morthland.*

CHARLES MERCER, Esq., of Lethindy,
REV. MR. WILLIAMSON,

Appellant ;
Respondent.

House of Lords, 17th March 1786.

MANSE—BUILDING OR REPAIRING.—Held, where the presbytery had ordered an old manse to be pulled down, and a new one built, that

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 MERCER
 v.
 WILLIAMSON.

they were not precluded from doing so, though the old manse might be repaired at a less expense than the cost of a new one; and also held, that they were not limited by the act 1663 to the sum of £1000 Scots, (£83. 6s. 8d.) but entitled to go beyond it, whatever the expense of building might be.

By law the heritors and land owners of each parish in Scotland are bound to build and repair the churches and manses of the ministers. The manse and offices of the parish of Lethindy having become ruinous, the respondent, the incumbent of the parish church, applied to the presbytery of the bounds, stating the ruinous condition of the offices, and dangerous and insufficient state of the manse, and praying a visitation, in order to have these restored. The presbytery having taken evidence as to the state of the manse and offices, ordered the old manse to be pulled down and a new one to be built, together with suitable offices, and assessed the heritors of the parish in the sum necessary to defray the payment thereof, amounting to £210, and granted decree accordingly.

The appellant, who is the largest heritor in the parish, holding land to the extent of three-fourths of the whole property in it, received notice of these proceedings, but did not do any thing further than intimate his opinion that he deemed a repair of the old manse quite sufficient, in the circumstances. But this course not having been adopted, he brought a suspension of the decree of the presbytery to the Court of Session, setting forth that the manse having been built so recently as 1756, could not be beyond repair from age, and that a repair was the proper step that ought to be taken.

The Lord Ordinary, after a remit made to a builder to examine and report on the condition of the manse, pronounced an interlocutor, finding that it was for the advantage of all parties that a new manse should be built; and to this interlocutor, on reclaiming petition, the Court adhered, with expenses, and decerned.

Aug. 10, 1784.

Jan. 25, 1785.

Jan. 27, —

Feb. 3, —

Mar. 8, —

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The act of Parliament passed in 1663 provides that the heritors shall provide and build manses, but it also, at same time, stipulates that the expense thereof shall not exceed the sum of £1000 Scots (£83. 6s. 8d.)—That this was a positive enactment of the statute, which being binding in all cases, the Court of Session had no discretionary power to extend it beyond the maximum men-

tioned. Besides, there was really no necessity in this case for a new manse, as the old might, as is clearly proved by the proof in process, have been repaired at a much less cost to the heritors.

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Pleaded by the Respondent.—The plea founded on the act 1663, that the sum is limited to £83. 6s. 8d. is untenable, because that sum had reference to manses immediately then to be built in parishes where there had been none before. Perhaps the sum was reckoned sufficient in those days for building a manse, but now that things and circumstances have changed, the legislature never intended that this sum would be sufficient for such a purpose in all future times. This is evident from the act itself, because in the very next clause, where it comes to speak of the repairs of manses then already built, no limitation in amount is imposed whatever in that department of expense, while, in the present instance, the new manse has been ordered to be built only after the most careful inquiry that such was necessary, and the most advantageous course for the heritors.

After hearing the appellant's counsel,

LORD CHANCELLOR said,

“The respondent's counsel need not answer. The Court of Session had gone according to the spirit of the statute, and according to many former decisions. The appellant was inexcusable for bringing such a matter here ; and therefore I move to affirm with £100 costs.”

It was ordered and adjudged that the interlocutor complained of be affirmed with costs.

For Appellant, *Ilay Campbell, John Hagart.*

For Respondent, *Alex. Wight, Wm. Adam.*

NOTE.—Not reported in Court of Session.

MESSRS. STURROCK & STEWART,

Appellants ;

WILLIAM PORTER, Merchant St. Peters-
burgh, and ALEXANDER OGILVIE, Mer-
chant Leith, his Attorney,

} *Respondents.*

House of Lords, 27th March 1786.

FACTOR—SALE—NOTICE.—Held, where a foreign merchant was commissioned to purchase flax for a merchant in Dundee, that

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 —————
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the former was not liable for the loss of the flax by fire, which he had purchased, though he had not intimated the purchase to his employer; the flax being only part of the quantity ordered, and was put into a store, waiting the arrival of a vessel to take it to Dundee.

The appellants having ordered, by letter, their correspondent, Mr. Porter, at St. Petersburg, to purchase for them a quantity of flax, to be shipped for them to Dundee, he, in compliance with their order, had purchased several parcels, and had part stored in a warehouse awaiting shipment, when the warehouse was burned down, and the flax destroyed by fire. No intimation had been received of the purchase, which was only part of the quantity ordered; and when a demand was made for payment, this was refused, whereupon action was raised by Porter and his attorney before the Judge Admiral for £481, the price of the flax. The question was, Whether the property was sufficiently transferred, so as to make the loss fall on the appellants, or whether the loss ought to fall on the respondent Porter? In defence to the action, the appellants urged, 1. That there was no evidence of the purchase having been made as ordered. 2. That if it was made, they were not liable for the loss, because they had not been advised of the purchase previous to the accident. A proof being allowed, the letter or order to purchase was produced, and the following points established:—That he purchased 1071 poods of flax for the appellants, and laid it up in a warehouse to await the arrival of vessels for shipment; that it was not customary for factors in St. Petersburg to open an account, or make an entry in their books, of purchases made for correspondents, till the orders are completed and the goods shipped, and that it was not customary to give advice of *partial purchases*. The Judge Admiral, upon consideration of the proof, decerned for payment.

Aug. 7, 1783.

A suspension was brought, but the Lord Ordinary, of this date, repelled the reasons of suspension, and decerned. On Dec. 9, 1784. reclaiming petition to the whole Court the Lords, of this date, adhered to the Lord Ordinary's interlocutor, and also June 16, 1785. on further petition adhered. Aug. 4, 1785.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—It is the general rule of law and custom of merchants, that goods purchased by a factor are not, and do not lie at the risk of the merchant commis-

sioning such goods, unless the factor gives advice or notice that such goods have been purchased on his account, in terms of the order. In the present case, no such advice was given, and therefore the flax lay at his own risk, and, when consumed, was a loss to the factor, and not to the appellants. Had advice been given, they might have insured against fire.

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v.
BUCHANANS.

Pleaded for the Respondent.—Having received a letter from the appellants commissioning him to purchase 60 lasts of flax, the respondent Porter purchased part, consisting of 1071 poods, from Leverikoff, which part, though burned while in the warehouse waiting the arrival of vessels for shipment, was the property of the appellants, and the loss fell on them, and not on the respondent Porter. The latter acted in compliance with the letter of instructions,—he paid the price with his own money for the flax; and it must be shown that he has been guilty of gross negligence, in following out the orders, or has occasioned the fire, before the loss can fall on him. The property being the appellants, the loss is also theirs. And the want of advice is not that neglect, for which law holds a party responsible. Besides, it was clearly established by the proof, that it was not the custom of merchants at St. Petersburg, to give advice of the partial execution of orders. No request as to advice was made, no intimation given of an intention to insure in any shape, otherwise intimation would at once have been given.

After hearing counsel, it was
Ordered and adjudged the interlocutors be affirmed.

For Appellants, *R. Mackintosh, Alex. Wight.*
For Respondents, *Ilay Campbell, Edw. Bearcroft.*

NOTE.—Unreported in Court of Session.

[M. 14,200.]

JAMES HILL, Trustee on the Bankrupt Es- tate of Wilson and Brown,	} <i>Appellant;</i>
GEORGE and JOHN BUCHANAN, Merchants in Glasgow,	
	} <i>Respondents.</i>

House of Lords, 11th April 1786.

SALE—BANKRUPTCY.—30 hogsheads of tobacco were bought on the eve of bankruptcy, and 8 hogsheads delivered the day before

1786.
 ———
 HILL
 v.
 BUCHANANS.

the failure was known, but the 22 hogsheads not delivered; the bills stipulated for the price were not granted; and the seller insisted for return of the 8 hogsheads. The bankrupts voluntarily returned them. Held, in a question with the creditors, that the seller was entitled to retain possession of the whole, on emerging bankruptcy.

The question in this case was, Whether a sale of tobacco, made by the respondents to Wilson and Brown, had been completed so as to pass the property before bankruptcy.

Mar. 5, 1783. Of this date, the respondents wrote to Wilson and Brown:—

“ GENTLEMEN,—We make you an offer of thirty hogsheads
 “ of tobacco, imported from New York in the Ruby, *to be*
 “ *delivered* to you or order at Greenock, as it lies at the
 “ king’s cellars, and at the weight passed at the king’s
 “ scales; one of which 30 hogsheads is still on board the
 “ ship, and shall be delivered to you when landed, at the
 “ price of 23½d. per pound, you granting us bills for the
 “ same, payable at six or seven months from this date.” Of
 the same date, this offer was accepted of by letter, signed
 by Wilson and Brown, and samples of the tobacco of each
 hogshead sent.

The tobacco lay in the cellars of the respondents, and
 Wilson and Brown having applied for delivery in terms of
 the sale, of eight hogsheads, obtained these through their
 doer in Greenock, who shipped them along with other four
 hogsheads to Liverpool, in name of Wilson and Brown on
 Aug. 13. the 13th August. On the same day, Wilson and Brown had
 informed many of their friends in Glasgow, that they were
 Aug. 14. obliged to stop payment, and next day their failure was
 public over all Glasgow. On its reaching the respondents’
 ears, George Buchanan, one of their number, called on that
 day at the counting house of Wilson and Brown, and de-
 manded back the missive letter of sale, and also the bill of
 lading, as to the eight hogsheads, which being done, the bill of
 lading being in Wilson and Brown’s name, was got altered,
 Aug. 15. and a new bill of lading in the respondents’ name was pro-
 cured for the eight hogsheads, which by this time were on
 board of the ship for Liverpool. Mr. Brown, at same time,
 promised to return the samples of tobacco. On the 15th
 August, the whole 30 hogsheads were thus completely in
 their possession undelivered. The bills for the price had
 Aug. 17. not been granted, and the sequestration did not take place
 until two days thereafter.

The appellant Hill, being appointed trustee on Wilson

and Brown's estate raised action for £4780, as the value of the 30 hogsheads of tobacco.

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The Lord Ordinary ordered informations, and reported the case to the whole Court, the leading arguments against the action of the trustee being, 1. That the sale of the tobacco was not complete, nor the property thereof transferred, because the tobacco was not delivered, nor the bills stipulated to be given for payment of the price granted. 2. That Wilson and Brown were insolvent at the time of the sale; and, 3. Conscious of this, they had voluntarily quitted their right as purchasers, and had given up their right to the whole tobacco to the respondents, before Wilson and Brown were rendered bankrupts in terms of law.

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The Court, of this date, pronounced this interlocutor, Jan. 25, 1785. "Sustain the defence and assoilzie: Find the pursuer liable to the defenders in expenses; and appoint an account thereof to be given into Court." Their Lordships modified Feb. 26, — the expenses to £50.

Against these interlocutors, the present appeal was brought.

Pleaded for the Appellant.—The sale was complete, and the transference of the tobacco in question, under that sale, to the bankrupts, was beyond all question. The exchange of missives was evidence of the one, and the delivery of the samples clearly demonstrated the other. Nay, further, the bankrupts had every control over it. They had got actual delivery of eight hogsheads, which they shipped on their own account to Liverpool as their undoubted property. The twenty-two remaining hogsheads only lay in the warehouse to suit their convenience in paying the duties to which they were subject; but they say they were delivered to them. And the whole delivery of the tobacco was rendered complete by delivery of the samples, which was evidence that the whole was at their unlimited disposal. The transference being thus complete, it was not in the power of the bankrupts to undo the transaction, and to give back the tobacco after they had stopped payment; and for to allow the sellers to resume the property, would only be conferring on them a preference to the manifest injustice of the other creditors.

Pleaded for the Respondents.—The contract was not complete at the time of the bankruptcy of Wilson and Brown, because the bills stipulated for the price were never granted. Until these bills were granted, they had no right to the tobacco, and no control over it whatever; and if they had no right, as little can their creditors pretend any right to

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the same. The property of the tobacco at the time of the bankruptcy was in the person of the respondents. It had not been transferred to Wilson and Brown, and was undelivered. And as by law, the contract of sale, before actual delivery of the goods sold, establishes nothing more than the obligations which each has become bound to implement, the respondents are entitled to retain the tobacco, and the creditors not entitled to claim it, without payment of the price. All the hogsheads were in possession of the respondents on the 15th August, two days before the bankruptcy, and they are entitled to retain these as security for the price on emerging bankruptcy. There is no delivery by samples known in the law; but even if delivery to the bankrupts had been otherwise complete, it was only the act of an honest man to return back goods which they had no means of paying, and which they were bound to do if they contemplated bankruptcy. To do otherwise would be a fraud. And indeed the whole transaction was void, on the head of presumed fraud, because at the time it was impossible to suppose that they had purpose or ability to pay the price, and must therefore be looked on as parties having the intention to become bankrupt *cedere foro*, at the time of the delivery of the eight hogsheads.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *John Morthland, Wm. Adam.*

For Respondents, *Ilay Campbell, W. Grant.*

[M. 15,618.]

MRS. ANN PATERSON of Eccles, and PHILIP
 ANSTRUTHER, Esq. her Husband, MARY
 PATERSON, and ALEXANDER CAMPBELL
 her Husband, and HENRY CAMPBELL their
 Son, - - - - -

} *Appellants;*

STEPHEN BROMFIELD, Esq. - - -

} *Respondent.*

House of Lords, 19th May 1786.

ENTAIL.—A party had made an entail with power to alter. He afterwards altered, and made a new entail, differing in the destina-

tion from the first, with a clause merely referring to the prohibitory, irritant, and resolute clauses in the first deed. Held, this reference clause not sufficient as an entail to protect against creditors.

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Jan. 29, 1743.

In 1743, Sir John Paterson, Bart., of Eccles, executed an entail of his estates of Eccles and Hope Pringle, containing the usual prohibitions, with irritant and resolute clauses; but reserving power to alter or revoke at pleasure. The entail was duly recorded, and was granted, under burden of the entailer's debts, with power to sell the estate called Hope Pringle for payment thereof.

By a subsequent deed, Oct. 1755, he revoked the power given to heirs of entail to grant heritable security for infestment over the estate, and he also discharged all further power of revocation of the entail. This deed was recorded in the register of entails.

A new deed was executed by the entailer, in July 1758, materially differing from the former destination. It recited the previous entail, and the power reserved therein; but was obviously granted with the view of its having the force of an entail. It had not the usual prohibitory and resolute clauses; but a reference merely was made to the prohibitory, irritant, and resolute clauses in the previous entail, by the insertion of the following clause:—"With and under the provisions, conditions, irritant and resolute clauses, as contained in the original bond of tailzie, and in the charter and infestment following thereon." This deed was not recorded.

July 1758.

On the death of the institute, the respondent, one of his creditors, brought an action against the heiress of his debtor for payment of his debt, in which the question came to be, Whether the latter deed, containing only a reference to the prohibitions, irritant and resolute clauses contained in the former entail and infestment, was effectual to protect against creditors?

The Court pronounced this judgment, on remit from the House of Lords:—"In obedience to a remit from the Lords Spiritual and Temporal in Parliament assembled, find, That in respect the disposition 1758 differs in several articles from the entail 1743, and in particular, that certain heirs or substitutes called by the entail 1743, are omitted in the disposition 1758, and that this disposition was followed with charter and infestment, therefore it is to be held a new settlement of the estate; and not having con-

Mar. 11, 1786.

1786. "tained the clauses prohibitive, irritant and resolute, and
 ——— "not having been recorded in the register of entails, is not
 PATERSON, "an effectual entail: Find, that in respect the clauses irri-
 &c. "tant and resolute in the entail 1743, are not particularly
 r. "inserted in the disposition 1758, the same, though held as
 BROMFIELD. "a conveyance, is not effectual against creditors, and remit
 "to the Lord Ordinary to proceed accordingly."

Against this interlocutor the present appeal was brought.

Pleaded for the Appellants.—The judgment of the Court of Session, upon the present and former appeal, has proceeded on the supposition that the deed of 1758 was a separate and distinct entail of the estate, and as such, not good against creditors, unless it contained the usual prohibitory, irritant and resolute clauses, and was recorded as a separate entail in the register of tailzies. But the appellant humbly conceives, that if the deed is to be considered as a new and distinct settlement, in so far as it differs from the previous one, it was not in the power of Sir John to execute such a disposition, as far as the same was inconsistent with the entail of 1743 and 1755, because, by the last of these two deeds, Sir John Paterson had renounced and discharged his power to alter and revoke, reserved in the entail of 1743. But, in point of fact and law, the settlement of 1758 was not a new settlement of the estate, but merely a continuation of that previously made, and must, from the precise and special reference made from the one deed to the other, be held to be one and the same deed, though in point of fact a separate deed; yet, as it contains a clause making reference to the prohibitions, and irritant and resolute clauses in a former one, this ought to be held just as equally sufficient, as if it had contained these clauses expressly enumerated.

Pleaded for the Respondent.—When entails are set up against onerous creditors, a stricter rule of construction is to be applied to them than is commonly done where the question is between heirs; and, accordingly, unless the requisites of the statutes in regard to these deeds be complied with, they cannot be effectual against creditors. In the present case, the disposition 1758 was a new settlement of the estate, in many respects different from the previous entail. It contained no prohibitory, irritant and resolute clauses, and though it bore a reference to the prohibitory, irritant and resolute clauses in the former entail, yet this was not sufficient to make it effectual; and, besides, being unre-

corded, it was totally inoperative as such. Even assuming that it was not a new settlement, still it was a conveyance under which the institute enjoyed the estate. And in this view, it was equally necessary, in terms of the entail act, to have engrossed the limitations of the first entail in this title, which not having been done, and the general reference contended for not being sufficient in law, did open the estate to the diligence of his creditors.

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After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Ilay Campbell, Alex. Abercromby, J. Anstruther.*

For Respondent, *Alex. Wight, Wm. Adam.*

ALEXANDER ROBERTSON, Merchant in Portsoy, *Appellant*;
HELEN INGLIS, Daughter of JOHN INGLIS, *Respondent.*

House of Lords, 14th Feb. 1787.

MARRIAGE BY COHABITATION AND ACKNOWLEDGMENT.—Circumstances in which the marriage was held complete.

This was a declarator of marriage and adherence, brought by the respondent, Helen Inglis, against the appellant, Alexander Robertson, setting forth that he, Robertson, had in 1769, made his addresses to her,—that he had urged her to be his wife, which, after some solicitation, she agreed to, and soon thereafter he fitted up a house for her,—that she, the pursuer, thereafter became desirous of being formally married by a clergyman, but he told her that this was not necessary, and that they were really man and wife, and that the ceremony would only give publicity to a thing which he wished concealed from his father and mother. That, in order to satisfy her, he wrote out and delivered to her a contract of marriage, which he afterwards abstracted from her repositories,—that, in virtue of these solicitations, and on the faith of these assurances, they cohabited together, and lived and resided in the house above mentioned as man and wife, from the year 1769 to 1783, during which time he behaved himself to her in all respects as a husband would do to his wife,

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by providing the necessaries of life, and by owning and acknowledging her as such; and she was owned and acknowledged as his wife, by the minister of the parish where he resided, and by the whole neighbourhood. That by the ten letters produced, he acknowledges her as *his dear wife*, and subscribed himself *her affectionate and loving husband*. The action was thus founded on three grounds, 1. Promise with subsequent copula. 2. Habit and repute; and, 3. Acknowledgment of marriage. In addition to these facts, the house in which they lived had been bought on her account. She was originally a servant, but, preparatory to marriage, he sent her to board, and for her education. On that event, he had given her an annuity of £50 per annum, in case of his predecease. When latterly he fell off in 1783, and proposed marriage to another female, Miss Brown, and this marriage was to be celebrated by a clergyman, none of the clergymen about the place would perform the ceremony, so public was the repute of their being man and wife; and Miss Brown and he had to get married by acknowledging, and going to bed before two witnesses, taking protest in the hands of a notary. In defence, the marriage was denied, and on proof being allowed, and taken on the import of the proof, the appellant contended that she had failed in establishing any of the three grounds of her action.

- Feb. 23, 1785. The Commissaries pronounced this interlocutor, “ Having
 “ resumed consideration of this cause, with the deposition
 “ of the witnesses, and letters and writs produced, find evi-
 “ dence sufficient for determining the cause, without the
 “ deposition taken by the Commissioner, and sealed up by
 “ him, which the Commissioner refuses to open. Find the
 “ facts, circumstances, and qualifications proven, relevant
 “ to infer a marriage between the pursuer and defender.
 “ Find them married persons accordingly, and find and de-
 “ clare in terms of the libel.” On advocacy, the Lord
 Ordinary remitted back to the Commissaries to open the
 July 8, 1785. sealed depositions, whereupon the Commissaries found, that
 the depositions, when opened, did not alter their view of
 the case, and therefore adhered to their former interlocutors.
 On advocacy, the Lord Ordinary reported the case to the
 Court, whereupon their Lordships directed the Lord Ord-
 inary to refuse the bill of advocacy, and to remit simpliciter
 Mar. 3, 1786. to the Commissaries.

Against these interlocutors the present appeal was brought.
Pleaded for the Appellant.—It is admitted that there was

no actual celebration of marriage; and a promise of marriage with copula following is not proved. The letters libelled contain no evidence of a promise *de futuro*, or of a consent *de presenti* to present marriage; and the parole evidence does not prove cohabitation or acknowledgment indicative of present matrimony; but the Court of Session have held that marriage may be constituted without either solemnization or conjugal intercourse,—a proposition quite untenable in the law of Scotland. But, on the supposition that marriage can be completed without either solemnities or conjugal intercourse, and by naked consent alone, there is no sufficient evidence of such matrimonial consent in this case, so as to constitute marriage. All the evidence consists in the letters produced by Helen Inglis; but these only prove the appointment of meetings held for a different purpose, namely, for clandestine intercourse, and they are addressed to her in her maiden name. These facts, taken in connection with those sworn to by Mr. Lawtie, the minister to whom she goes for advice in 1782, clearly show that no marriage existed. She denied to him having had carnal intercourse. What then are the specific grounds of marriage? The law of Scotland does not countenance constructive marriage, by blending together circumstances which relate to separate and distinct grounds of marriage, and inferring from these, when so massed together, the relation of marriage. Some specific and relevant ground must be taken and proved. The pursuer has changed her ground twice in the course of the action,—possibly she may change it a third time, and pretend that carnal intercourse, or clandestine cohabitation, makes marriage as effectually as open habit and repute cohabitation, which law requires, in order to create a presumption of marriage. Such a mode of constitution is without precedent in law. The letters only prove a clandestine and private intercourse, and no more. They do not prove habit and repute cohabitation; they do not prove carnal intercourse; and the whole evidence is totally destitute of proving any known form of marriage recognised in the law of Scotland.

Pleaded for the Respondent.—By the law of Scotland, if a man and woman consent to accept of each other as spouses, marriage between them is that instant created, though there be no witnesses present, and no consummation follow, the rule being *consensus non concubitus* makes marriage. The acceptance and consent by itself is marriage, and this consent,

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if denied, may be proved by the persons present, if any, or if not, by the deeds or writings of the parties, or the subsequent facts and circumstances clearly indicating such prior consent. In the present case, the letters prove this previous consent to marriage. They contain an express acknowledgment that, at sometime previous to their date, they had become man and wife. They are addressed to the respondent by "My dearest Nellie,"—"My dearest wife," and end with "your affectionate husband." They apprize her of his being obliged to leave town, &c., and state when he would be home, and when he would see her. Besides, this previous consent is proved by their public cohabitation as man and wife, and his calling her by the appellation of his wife in the presence of others, by his putting her to school, by purchasing and providing her with a house, and by giving her an annuity,—facts which are irreconcilable with anything but a clear marriage.

After hearing counsel, it was.

Ordered and adjudged that the interlocutors complained of be *affirmed*.

For Appellant, *Ar. Macdonald, T. Erskine*.

For Respondent, *Alex. Abercrombie, Wm. Adam*.

NOTE.—The letters founded on had no date, and in regard to the case, Lord Braxfield, in giving judgment in the Court of Session, stated that there were "three ways of making marriage by the law of Scotland, celebration, promise with subsequent copula, or cohabitation. This case falls under the last of these."

AGNES KELLO,	-	-	-	-	<i>Appellant ;</i>
PATRICK TAYLOR,	-	-	-	-	<i>Respondent.</i>

House of Lords, 16th February 1787.

MARRIAGE—CONSTITUTION OF Do.—Circumstances in which a written acknowledgment of each other as husband and wife, not seriously gone into on the part of the female, but immediately repented of, did not constitute marriage.

At the annual market fair of Skirling, the appellant, Agnes Kello, who was the only daughter of a farmer in Skir-

ling-Miln, became acquainted with the respondent Taylor, who had been a farmer in Birkenshaw. Taylor followed up this accidental meeting, by paying his addresses to her at her mother's house; he made an impression on her. But her parents inquiring more particularly into his character, were not satisfied. Their daughter was possessed of £2000, and her suitor was on the eve of a second bankruptcy. After eighteen months unsuccessfully soliciting her in marriage, he obtained the following writing signed by her, which he represented to her at the time to be quite innocent, and to mean no more than a declaration of her love and affection for him, and a promise of marriage at some future period, after her parents were satisfied.

"Skirling Miln, Feb. 16, 1779. I hereby solemnly declare you, Patrick Taylor in Birkenshaw, to be my just and lawful husband; and remain your affectionate wife. Signed Agnes Kello. To Mr. Patrick Taylor in Birkenshaw." He took this and kept it, leaving in her possession a counter acknowledgment signed by himself. No consummation or copula followed. They separated immediately; and a few days thereafter, when the appellant reflected on the matter, she came to think it improper and a "foolish business," and immediately sought back the line. He at first evaded her request; then promised to give it her back if she would give him an obligation for £500. About three months thereafter he came, along with two persons, one a relation and the other his creditor, and endeavoured to obtain the consent of her parents to the match, and also consent to the proclamation of banns. This proved unsuccessful. In a week thereafter she wrote him for a return of the letter, begging him "to return that foolish line," and stating that he could not be received in person till that was done. No answer was returned to this letter, which was dated in May 1779, and no further correspondence took place until the beginning of the year 1780, when he paid her a few visits. He then, on the eve of bankruptcy, came and prevailed on her parents to allow proclamation of banns to proceed on the ensuing Sunday. This, after considerable reluctance, was consented to; but, in the meantime, inquiries having been made, they dispatched a messenger to stop the proclamation of banns on Sunday. He arrived too late for the first and second proclamation, but only in time to stop the third. All further correspondence then ceased. And the present action of declarator was only raised by the respond-

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ent three years afterwards, when he heard that another was paying his addresses to her. In defence to the action, she stated that the acknowledgment was not a *de presenti* marriage, but only a promise of future marriage; besides, here the writing had been forced from her, and had been virtually retracted. That a private writing, supposing immediate consent intended, was not sufficient, unless consummation or cohabitation followed, which was the law laid down by the civil law, Lib. 22, Cod. de Nupt.—Lib. 13, ejusd. tit.—Cujacius observ. lib. 6, c. 20—Puffendorff, lib. 6, c. 1, § 14, and the law of Scotland, Dirleton's Doubts, tit. Sponsalia—Bankton's Inst. vol. 3, p. 60—Stair's Inst. p. 26. That the writing here was followed by no consummation, and, besides, he had agreed to return the letter to her whenever she required it. Further, as evidence that the letter was only understood as a promise or declaration of an intention to marry at some future period, she founded on his repeated solicitations thereafter to get her consent, and the consent of her friends, to the marriage, which the act with reference to the proclamation of banns itself demonstrated. The respondent, on the other hand, contended that *consensus non concubitus facit nuptias*, and in support of this doctrine, that marriage is constituted by consent alone, declared by the parties *per verba de presenti*, either by writing or in the presence of witnesses, the following authors were cited:—Stair's Inst. B. i. tit. 4, § 6—Bankton's Inst. B. 4, tit. 45, § 45, 48—Ersk. Inst. B. i. tit. 6, § 1.

The Commissaries pronounced an interlocutor of this
 Mar. 23, 1785, date, after ordering the judicial declaration of both parties:
 “ Having resumed consideration of the cause with the de-
 “ clarations emitted by the parties, in respect it appears
 “ that the defender, when arrived at an age when, by the
 “ law of Scotland, she was deemed capable of consent, vo-
 “ luntarily and deliberately granted to the pursuer, the de-
 “ claration libelled on, and received from him a counter de-
 “ claration of the same import; find the mutual obligations
 “ relevant to infer marriage between the parties; find the
 “ pursuer and defender married persons accordingly, and
 “ decern.” The case having been brought by advocacy to
 the Court of Session, the Lord Ordinary refused the bill, on
 reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—There is no authority in law

for holding that any private writing, supposing consent *de presenti* intended, *ipso facto* makes marriage. There is no precedent for any such doctrine. Consent is by itself only a step; but, in order to constitute marriage by it, something more must follow. Subscribing two lines bearing that she takes a man for her husband, or a man declaring that he takes a certain woman for his wife, by a like writing, is not marriage by the mere act of writing, if nothing follows; because such a writing can in no view be that deliberate *de presenti* consent which the law requires; and most assuredly it is not every declaration of consent *de presenti* that will make a marriage. Such consent must be serious—must be solemn and deliberate. There is no evidence of this nature in granting this acknowledgment. Nothing but levity, foolishness, and want of consideration appear. Artful contrivance it was on his part; unreflecting foolishness on the part of the female. She repents this foolish affair in two days, burns her own copy, demands back the lines which he held—a circumstance which is decisive at once that such consent, if any existed, was not serious or solemn, but given rashly, and retracted immediately. Had such consent been solemn, and had the parties by that act been married, they would not have lived apart. The appellant would not have refused, as she did, to proceed any farther to consummate it, and he would not have acted altogether inconsistent with the notion of a marriage already existing. But even supposing any thing was meant by this foolish letter, it was no more than a promise or declaration of intention to marry at some future period. That such was the meaning of the document is demonstrated by his whole subsequent acts—his repeated solicitations to have the marriage celebrated, and his twice attempting to have celebration of banns. Holding it therefore only as a promise, on which no copula and no consummation having followed, it was not sufficient to constitute marriage by the law of Scotland.

Pleaded for the Respondent.—Marriage is a consensual contract, which is perfected by consent alone, cohabitation or consummation not being essential, but only a concomitant or consequence of the constitution of marriage. Consummation is not the primary aim and condition of marriage, it is only an accessory. And though parties, who from accident or natural causes, are incapable of consummation, may insist on setting aside the marriage, yet this is not because such consummation is essential to the constitution of

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the contract, but only that one of them is not able to perform the obligations incumbent upon him; but it is no good reason for annulling complete consent and vacating the contract, where both parties are able to fulfil it, because one of them refuses to do so. Celebration therefore being unnecessary, and consent having been here given, the question is, whether the written acknowledgment is complete evidence of that consent *de presenti*. Now really the writing here is so plain and simple in meaning, as to render it impossible for any one to mistake its import. It is clearly a *de presenti* consent. Added to this, there is a strong circumstantial evidence of a *copula* having followed, because, in the general case, such acknowledgments are usually granted only to give a legal sanction and colour to such a connection. The writing therefore was given as a solemn consent to *de presenti* marriage, and every thing in the relation of man and wife would have followed, had it not been for the injudicious interference of her friends. Her affections were already his; and her own and the future happiness of the respondent rest on the decree of the Court of Session being affirmed.

After hearing counsel, it was

“ Declared that the two letters insisted upon in this process, dated the 16th day of Feb. 1779, signed by the
“ said Patrick Taylor and Agnes Kello, respectively and
“ mutually exchanged, were not intended by either, or
“ understood by the other, as a final agreement; nor
“ was it so intended or understood, that they had thereby contracted the state of matrimony, or the relation
“ of husband and wife, at and from the date thereof; on
“ the contrary, it was expressly agreed, that the same
“ should be delivered up, if the purpose they were calculated to serve proved unattainable, whenever such
“ delivery should be demanded, which last mentioned
“ agreement is further proved by the whole and uniform
“ subsequent conduct of both parties. Therefore ordered and adjudged that the interlocutors complained of be *reversed*, and that the Court of Session do
“ remit the cause to the Commissaries with instructions
“ to assoilzie from the declarator of marriage.”

For the Appellant, *Ar. Macdonald, Rob. Dundas.*

For the Respondent, *Jas. Boswell, C. Hay, Wm. Adam.*

NOTE.—Unreported in Court of Session.

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ALEX. CLERK, Aberdeen, - - - Appellant ;
 HUGH GORDON, - - - Respondent.

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House of Lords, 9th March 1787.

GESTIO PRO HÆREDE—PASSIVE TITLE.—A father had conveyed his *whole* estate, heritable and moveable, to his *third son*, who, in recovering, found an heritable debt of £60, which was not specially embraced in the conveyance. To remove objections to his title to receive and discharge the debt, the father's eldest son and heir-at-law, consented to sign the discharge along with his brother. Held, that this subjected him in the passive title of *gestio pro hærede*. But, in the House of Lords, case remitted back for consideration, and to adduce proof that, at the date of the discharge, his brother was in right to receive the debt of £60.

The appellant, Alexander Clerk, was the *eldest* son of the deceased John Clerk, advocate in Aberdeen. The appellant's father, before his death, conveyed his whole heritable and moveable estate to his *third son* James; and in the course of the latter recovering that estate, it was found that there was an heritable debt of £60 which the settlements did not specially convey, and the debtor, when payment was demanded, having objected to James' title, unless a discharge was got under the hand of the heir at law, or an adjudication in implement expedite. The appellant was accordingly solicited by his brother to sign a discharge for the £60 bond. On its being explained that it was a mere form, to dispense with the expense of making up a title by adjudication in implement, he signed the discharges along with his brother,—the latter having three months previously received the money. The question was, on the failure of the father's funds to pay his debts, whether the appellant, the eldest son and heir at law, had thereby subjected himself in liability for his father's debts, under the passive title of *gestio pro hærede*?

By the appellant, who was defender in the action, it was contended, on the special circumstances above set forth, that he had not incurred a passive title by granting a discharge, simply to facilitate his brother's recovery of this small debt,—that he had taken no advantage from that deed,—that his brother had received the money, and had a universal right to receive it, and his signature was only adhibited to com-

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plete the latter's title (otherwise imperfect) to that sum. It was answered, that these circumstances could not redargue the plain language and legal effect of the discharge, whereby he acknowledged receipt of that sum, and discharged his father's debtor accordingly.

Jan. 25, 1785.

The Lord Ordinary, of this date, found "that the said Alexander Clerk behaving as heir to his father, is sufficiently instructed by the discharge founded on by the pursuer, therefore recalls the commission granted by the former interlocutor as unnecessary, advocates the cause, and finds the defender liable in the principal sum, and interest libelled."

Nov. 29, 1785.

On two reclaiming petitions to the Court, the Lords Dec. 14. — adhered.

Dec. 17, —

Against these interlocutors, the present appeal was brought.

Pleaded for the Appellant.—The Court of Session has decided that the mere circumstance of signing the discharge, apart from the circumstances and special object for which it was signed, is a behaviour as heir sufficient to subject him in liability for his father's debts. For this proposition, the appellant maintains there is no authority in law, because, when the circumstances under which he signed the discharge are considered—circumstances which must necessarily enter into consideration, before any legal conclusion can be deduced, in order simply to ascertain whether they be such as in law commonly infer a behaviour as heir, it at once appears that they do not make out any such behaviour as heir, that the law recognizes as such. He has not intermeddled with the repositories of the deceased,—he has not taken possession of his papers, or any of his household goods, his jewellery, &c. None of his means, real or personal, has been touched by him. His father's settlement constituted his brother executor, intromitter, and universal legatory of his whole means and estate. He alone intromitted with the universitas of that estate; and all the appellant did was to lend the use of his name to his brother, in order to complete his title to an heritable debt of £60, and thereby save him considerable expense. He is ready to prove, that this alone was the precise extent of his whole interference,—that he never fingered a shilling of that £60,—and that he never manifested any intention whatever, either by this discharge or otherwise, of intromitting with the smallest portion of his

father's estate. Besides, the discharge itself, sufficiently proves all this.—He does not sign it alone, he signs along with his brother, the party alone entitled to, and who alone received the £60. When these circumstances are considered, it plainly appears that no *mala intention*, which is of the essence of the passive titles,—no fraud,—no actual intromission,—and not even an intention of such, can be set up in support of the present interlocutor. The estate too was moveable and not heritable. No infeftment had followed on the disposition in which it was made a burden, and was carried by the father's testament.

Pleaded by the Respondent.—Where a party acts or behaves himself as heir, in any thing or in any way, with respect to his ancestor's estate, he makes himself universally liable for his ancestor's debts. Such is the settled law of Scotland. And the appellant, in the present case, has just done what exactly answers the legal description of behaviour as heir. He has granted a discharge for an heritable debt as such, which is perhaps the most unequivocal act of behaviour as heir that could possibly exist. And it is mere pretence to say, that he gave the money to his brother, or allowed him to receive it, because this is by no means proved; and even if less doubtful than it seems, still, the argument would be immaterial and unavailing, because, in point of fact, the £60 heritable debt was his, as heir at law, and not his brother's, to whom it had not been conveyed, and the discharge was as much a behaviour as heir, and an incurring of the passive titles as such, whether the money was paid to another or directly to himself.

After hearing counsel, it was

Ordered and adjudged “ that the cause be remitted back to the Court of Session in Scotland, without prejudice,
 “ with liberty to the defender to produce such proofs
 “ as he can that James Clerk, on the 30th Sept. 1778,
 “ (date of discharge), was entitled to the debt of £60
 “ due by Raitt, or the trustees of Raitt, mentioned in
 “ the pleadings, reserving such objections to the competency of the evidence as the nature of the evidence
 “ itself, or the period of the cause in which it is produced may be liable to.”

For Appellant, *Ilay Campbell, Wm. Alexander.*

For Respondent, *Alex. Macdonald, Sylv. Douglas.*

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 ———
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 v.
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NOTE.—When this case came back to the Court of Session, the Court sustained the defence pleaded against the passive title *gestio pro hærede*, it being observed on the Bench, that as the Court had given relief in the case of actual service, while there was no intention to represent, so *a fortiori*, the same indulgence was due here. —M. 9734.

ARTHUR SINCLAIR of Masilapatam, Esq., *Appellant*;
 MARGARET YOUNG, wife of JAMES GORDON,
 Younger of Cairston, and GEORGE }
 ANDREW, Writer in Edinburgh, her } *Respondents*.
 Curator, - - -

House of Lords, 20th March 1787.

SUCCESSION TO ADJUDICATIONS—INTEREST—HERITABLE OR MOVABLE.—Whether the accruing interest in an adjudication belongs to the heir or executor? Held, in a question of compensation, that the interest accumulated and accruing, in an adjudication, is heritable, and belongs to the heir, and therefore did not fall under the husband's *jus mariti*.

Captain Allan was, before his death, owing Andrew Young, the respondent's father, the sum of £12,000 Scots, (£1000 sterling), for which debt he adjudged Allan's estate of Cairston for the accumulated sum of principal and interest, amounting to £18,305. 10s. Scots.

Andrew Young having died, was represented by his only child, the respondent Margaret Young. On Captain Allan's death the appellant succeeded to his estate, and being anxious to redeem the same from the adjudication, offered to do so; but insisted that he had a right to compensate or set off against that part of the accumulated sum and interest which belonged to Margaret Young, a sum of £300 owing by her husband, James Gordon, to him, which being refused, he brought a bill of suspension to try the question.

July 5, 1785. The Lord Ordinary, of this date, found “ That Mr. Gordon, Margaret Young's husband, has right to the annual-
 “ rents arising from the accumulated sum in the adjudica-
 “ tion, *jure mariti*, and that during the subsistence of the
 “ marriage; therefore sustains the reasons of suspension, as

“pleaded on the ground of compensation and retention.” 1787.
 But, on reclaiming petition to the Court, the Lords unani-
 mously altered the Lord Ordinary’s interlocutor, and “Re-
 pel the grounds of compensation pleaded by the suspender,
 find the letters orderly proceeded, and decern.”—And a
 reclaiming petition against this judgment was refused.

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 v.
 YOUNG, &c.
 Dec. 23, 1785.
 Jan. 31, 1786.

Against these interlocutors the present appeal was brought.

Pleaded by the Appellant.—The one-half of this debt belongs to Mrs. Margaret Young or Gordon. On this sum interest runs, and it therefore follows that the interest due upon that sum falls under the *jus mariti* of her husband. For although an adjudication renders heritable the accumulated sum for which it is led, yet the interest accruing thereon, from the time it becomes due, is a personal subject, falling under the executry like any other arrear of rent or interest, and therefore compensation ought to be sustained to that extent.

Pleaded for the Respondents.—The *jus mariti* of the husband over his wife’s estate, does not extend to her heritable estate. This right extends only to the moveable estate; and the adjudication here makes the debt heritable, so as to deprive him of all benefit, under his *jus mariti*, over the same. Nor can he ever have any claim over the interest of that sum, because an adjudication is a diligence resorted to, in order to recover payment of the debt out of the real estate, and not to afford a security for an annual income. The interest, therefore, accruing upon it, cannot be considered in the same light with the arrears of interest in an heritable bond, for these are separated from the principal as they fall due, but, in an adjudication, there is no obligation to pay interest annually; and it has been long settled, that the interest accruing on an adjudication descends, along with the principal, to the heir, and therefore is not covered by the *jus mariti*; and so compensation here is not pleadable.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For the Appellant, *Ilay Campbell, William Tait.*

For the Respondents, *R. Dundas, Alex. Wight.*

NOTE.—This case is shortly noticed in M. 5545, but it does not seem to be noticed that the case was appealed. It is there stated, that “the Court of Session declined entering into a discussion of the question, as a departure from a general rule so solemnly establish-

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“ ed ;” and “ That the whole sums contained in a decret of adjudication, whether principal, annual rents, or penalties, belonged to the heir.”

[M. 14,955 et M. 5229.]

MRS. ELIZABETH ROSE of Kilravock, - *Appellant ;*
JAMES ROSE, an Infant, and FRANCIS RUSSEL, } *Respondents.*
Advocate, his Guardian, - - -

House of Lords, 2d April 1787.

SUCCESSION—HEIRS PRIMARILY LIABLE—RELIEF AMONG HEIRS—

HEIRS WHATSOEVER, HOW INTERPRETED ?—Several estates belonging to the same ancestor, were together conveyed in security of debt by heritable bonds. Part of the estate descended, after his decease, to the heir of line, and another to the heir male. Held, reversing the judgment of the Court of Session, that the heir male has not relief against the heir of line, in so far as the bonds are charged on his estate.

The barony of Kilravock, along with other estates, belonged to the family of Rose, the investitures in which, for the last 500 years, had stood destined to *heirs male*, and had descended from father to son, without interruption, till the death of Hugh Rose in 1600. After this, it had descended in the same manner to the fourth Hugh Rose, the appellant's brother, who died in 1782 without issue, leaving the appellant, his sister and heir of line, the heir male being the respondent, who was a grandson of their granduncle. According to the old investitures, the latter was entitled to succeed as heir male, and claimed the estate accordingly. But, in consequence of an alteration of the investitures during the possession of the latter series of heirs, between 1600 and 1782, chiefly for the special purpose of creating votes, a new order of heirs was introduced. The way this is usually done is, by first separating the property from the superiority. And in doing this, in the present instance, the property and Barony of Kilravock was conveyed by feu charter to a Lewis Rose, whom failing, to return to him, the said Hugh Rose, “ *and his heirs and assignees whatsoever.*” In the conveyance of the superiority, the same terms of destination were used, “ to four gentlemen named in liferent,

“and to himself *and* his heirs and assignees whatsoever in fee.” Previous to executing these deeds, Hugh Rose, then in possession, obtained a charter from the Crown, conveying these estates to himself and his heirs male, and *assignees whatsoever*, the object of which evidently being, to enable him to grant freehold qualifications. Infestment was not taken in direct terms of the grant; but, in the above conveyances, it was assigned over in a manner to suit the purpose for which they were granted. When Lewis Rose, in 1775, came to recover the property of the barony of Kilravock to the appellant’s brother, the draft had been drawn out so as to stand thus,—to Hugh Rose and his heirs male and assigns whatsoever, and in these terms it was engrossed, when Hugh Rose ordered it to be altered to the following,—“to himself and the heirs male or female of his body; whom failing, to the other nearest and lawful heirs male or female, and assigns whatsoever.” In a letter to his sister, it further appeared that he wrote her,—“Your Feb. 23, 1776. apprehensions, should the worst of events possibly happen, of falling into the hands of collaterals, are perfectly groundless, as the only deed yet executed by me, has conveyed it expressly in your favour.”

In an action of reduction brought by the appellant, to reduce her brother’s service as heir male of her father in the barony of Kilravock, which stood previously destined to her brother, and his *nearest heirs male or female whatsoever*, and to have it declared that she had right to succeed to the same as *heiress of line*, the Court held, by two interlocutors, that the old investitures to heirs male were vacated by the above deeds, “to heirs and assignees whatsoever,”—that this term was to be interpreted according to its strict and technical meaning, without reference to the former deeds, and this, notwithstanding it was contended, that from the very nature of these deeds, there could not be, and was no intention of changing the destination of the estate, and consequently, the Court held that the barony of Kilravock, both property and superiority, descended to the appellant as heir of line; but that the lands of Easter Geddes, Flemington, and Nairn, descended to the respondent as *heir male*.

A second question then occurred, as to the debts of the deceased, with which the whole estates were burdened.—There was an heritable bond of £7000 over Kilravock, Easter Geddes, Flemington, and Nairn; another of £5000

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v.
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 Mar. 11, 1784.
Nov. 26, 1784.

1787. — over Kilravock, Easter Geddes, Flemington, but not over Nairn; and £1000 over Kilravock and Easter Geddes, but not over Flemington or Nairn. Counter action was brought by the respondent, in which he contended that the whole debts which affected the estates of Easter Geddes and Flemington, which descended to him as *heir male*, must be paid by the appellant as heir general, or out of the estates which she took in that character. Thus an abstract question of law arose, Whether these parties were obliged, as between themselves, to contribute towards the discharge of the debt proportionally, according to the value of the estates by them severally taken; or if the heir general, or of line, is obliged to pay the whole, in case the estate she takes be sufficient for that purpose, leaving the estate taken by the *heir male* completely free?
- Jan. 17, 1786. — Of this date, the Court held: “That where the heritable
“debts are secured upon the estates descendible to the heir
“of line, and also upon the estates descendible to the heir
“male, that the heir male is by law entitled to a total re-
“lief of these debts from the heir of line.” And this judg-
ment was, on reclaiming petitions, afterwards adhered to.
- Jan. 19, —
Dec. 8, — Against the latter interlocutor the appellant appealed, and a cross appeal was also brought against the interlocutors of 11th and 23d March by the respondent.
- Pleaded by the Appellant.*—1. An heir, whatever be his character, can only take up the estate by succession *tantum et tale* as it was in his ancestor, encumbered with all the debts with which his ancestor had specially charged it, and hence, the general rule of law is, that one who takes an estate by descent, must pay the debts with which that estate is specially burdened, without recourse against those who take other parts of the estate, descending from the same ancestor, under a different title. Thus the heir in heritage must pay all debts heritably secured, without recourse against the executors. Thus, also, if an heritable debt be secured upon one estate only, descending to the heir male, it must be paid by him without recourse upon the heir of line, though the heir of line takes another estate, descending to him as such, from the same ancestor. The principle therefore of discharging proportionally, according to the value of their respective estates burdened, is the only one consistent with justice. 2. As to the property, the interlocutors on this branch of the case ought to be affirmed, because it is quite clear, whatever was the nature of the investiture pre-

viously, that this was changed from a *male fee*, to “*heirs whatsoever* ;” and it is no answer to this to say, that the deeds by which this was done, were merely intended to serve a temporary purpose, because after that purpose was served, it was then that the proprietor manifested an intention, and in point of fact did alter his deed after it was engrossed, so as to include “his heirs and assignees whatsoever.” This clear intention, on his part, to alter the destination, is further corroborated by the letter written to the appellant.

Pleaded by the Respondents.—1. It is an established rule, that the heir of line must be first discussed, and is liable primarily for the debts of the predecessor. The heir of line is the heir general, and *eadam persona cum defuncto*, and so generally liable for his debts. The heir special, by deed, is accounted a stranger, and, consequently not liable for the debts of the deceased, whatever these be. The heir of line or general must first be discussed, before the heir special or heir male can be called on. It is only when the proper estate of the heir of line fails, that recourse can be had against his estate for the ancestor’s debts. And if this right of discussion between heirs is to be regarded at all, it necessarily implies *relief* to this extent. 2. In regard to the barony of Kilravock. The term heirs whatsoever is flexible in its nature. It has no fixed and invariable meaning, but denotes heirs of any kind, consequently, its use here applied perfectly to the state of the ancient investiture, which was conceived to heirs male. By the later use of heirs whatsoever, therefore, it was not intended, and, in point of law, it did not change the destination of heirs male, but embraced such a destination. Besides, these deeds being obviously granted to serve a mere temporary and political purpose, were not, and could not be evidence of a deliberate intention to alter the destination from heirs male to heirs whatsoever.

After hearing counsel, it was

Ordered, that the interlocutors of the 11th of March 1784, in so far as the same sustains the reasons of reduction as to the *property* of the lands and barony of Kilravock, be affirmed, and that the interlocutors of the 26th November 1784, be also affirmed ; and that the interlocutors of the 17th and 19th of January, and the interlocutors pronounced on the 8th of December, and signed the 9th December 1786, be reversed. A declaration was made, that the Court of Session was ordered

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to give the necessary directions for carrying the judgment into execution.

For the Appellant, *Alex. Wight, Geo. Ferguson.*

For the Respondents, *Ilay Campbell, R. Dundas.*

NOTE.—In a later case, *Molle v. Riddle*, the same point as occurs in the first branch of this case, was decided 13th December 1811, Fac. Coll.

MATTHEW BOULTON, Esq. and Others, Creditors of SAMUEL GARBET, late of Birmingham, and of Prestonpans, in Scotland, Merchant, a Bankrupt,	}	<i>Appellants ;</i>
MESSRS. MANSFIELD, RAMSAY, & Co. of Edinburgh, Bankers ; MESSRS. DOUGLAS, HERON & Co., late Bankers in Ayr ; and WALTER HOGG, Trustee for the Creditors of SAMUEL GARBET & Co. of Carron Wharf,	}	<i>Respondents.</i>

House of Lords, 18th April 1787.

COPARTNERY.—An agreement dissolved a Company, and transferred the retiring partner's interest in stock, &c. of the concern, to the other partners, but provided that he was still to have a share of the profits of the concern. In a question with creditors, held, that the person so retiring was still a partner of the firm, and liable as such.

A copartnership was entered into by Samuel Garbet and Dr. John Roebuck of Birmingham in 1750, for the period of 40 years, and had subsisted, and had been carried on under the firm of "*Roebuck and Garbet*," until the year 1766. The object of the firm was, the manufacture of aquafortis, and refining gold and silver, chiefly originating with the invention and discoveries of Dr. Roebuck, and which manufacture was carried on in Birmingham. The Company had besides, other works at Prestonpans, in Scotland, principally for making oil of vitriol.

In January 1766, James Farquharson, one of their clerks,

was taken into the partnership at the Birmingham branch, which was thereafter carried on under the firm of "*Samuel Garbet & Co.*;" but the social name continued as before in regard to the Prestonpans branch, until September of that year; when a new agreement was entered into by Dr. Roebuck and Mr. Garbet. This agreement recited the articles of copartnery, and set forth, that it had now become inconvenient to the parties to carry on the said trade and firm *any longer in copartnership*; and therefore that they had agreed that the articles of copartnership should thenceforth cease and determine; but that the said parties should, notwithstanding, be equally entitled to the benefit of the said trade for time to come; and that Mr. Garbet should carry on the said trade for the term and purposes aftermentioned, without the interference of Dr. Roebuck.

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It appeared that Dr. Roebuck, according to a settled account, was indebted to the copartnership over and above his share of the stock and property of the concern, in the sum of £3587. 6s. 7d. And it was mutually agreed on that the partnership should be dissolved, as if the same had never been entered into, Dr. Roebuck, on his part, assigning and conveying to Garbet all his part and share in the debts, stock, property, &c. of the Company. The agreement further provided, that Mr. Garbet was to carry on this trade for 50 years, without any molestation from Dr. Roebuck; the latter, on his part, binding himself that he, during that term, should not carry on any such trade. It was also stipulated that Mr. Garbet was to keep books of the concern, which were to be accessible only to Dr. Roebuck or his executors; and that the profits therein, so far as applicable to Dr. Roebuck's interest, were to go in the first place to extinguish the foresaid debt of £3587. 6s. 7½d; and not until then was he to uplift any profit out of the concern. The deed contained a disposition and assignation to the Prestonpans works.

After this agreement, the social name of the firm of "Roebuck and Garbet," was laid aside; and the business, both at Birmingham and Prestonpans, carried on by Mr. Garbet; but, in point of fact, it appeared that after this date, Mr. Garbet used the same firm at Prestonpans as had been done at Birmingham,—namely, "*Samuel Garbet & Co.*;" and bills were drawn and accepted in this form both at Birmingham and Prestonpans. In the latter place the business was entirely managed by Mr. Downie.

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In 1772, James Farquharson became bankrupt, after which, the addition of "*Company*" to the name of Samuel Garbet, in the Birmingham branch, was dropt.

Mr. Garbet himself became bankrupt in 1782; and a commission of bankruptcy was issued by the name of "Samuel Garbet of Birmingham, merchant," in consequence of which, the works, effects, &c. at Birmingham were seized and sold, and the proceeds distributed as the private estate of Mr. Garbet.

1782. A sequestration was also at same time issued under the bankrupt act, 12 Geo. III. c. 72, in Scotland—the petition on which being presented in name of the respondents, Mansfield and Company, and Douglas, Heron and Company, as creditors of the said *Samuel Garbet*, wherein it was set forth, that Mr. Garbet had for many years carried on business in England and Scotland, under the name of Samuel Garbet and of Samuel Garbet and Company; but nothing was stated about Dr. Roebuck being a partner. But at the first meeting of creditors which took place in Scotland, it was brought under the notice of the meeting, that Dr. Roebuck had all along been a partner of the trade at Prestons, and that the effects were consequently first liable to payment of the joint debts. The creditors who made this allegation further stated, that as they were copartnery creditors, they had a deep interest in the matter. It was agreed that the sequestration should proceed as it stood, and the estate be converted into money, reserving all objections and all prior claims until the distribution thereof.

The respondent, Mr. Hogg, being elected trustee, proceeded to realize the whole estate; which being done, he brought the present action of multiplepinding to try the question between the two competing class of creditors.

The appellants were the private creditors of Samuel Garbet alone; and contended, That money in the hands of the trustee, as arising from the private estate of Samuel Garbet, must be distributed among his creditors rateably.

The respondents, on the other hand, maintained that the money arose from the joint estate of Roebuck and Garbet, that between these two gentlemen there was still a subsisting copartnership, notwithstanding the deed of dissolution and agreement in September 1766; that the copartnership had not, in point of fact, been dissolved by that deed; and that, at all events, such deed could have no effect, as latent and not published, to alter the responsibilities in a question with

creditors ; consequently the funds fell to be distributed among the copartnery creditors in the first place.

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The respondents, Mansfield, Ramsay and Company, further stated, that their demand arose for a balance of a current account between them and Roebuck and Garbet, commencing in 1765, when that partnership certainly subsisted. That they had no intimation of Dr. Roebuck's leaving the concern in 1766; and that they continued to advance money from time to time upon account with Downie, their Prestonpans manager, whose letter was produced, acknowledging receipt of " my accounts for Messrs. Roebuck and Garbet," up to 1773 ; but nothing was adduced to show that this firm was used as a signature.

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&c.

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Douglas, Heron and Company's (the other respondents) demand arose upon an account for money advanced by them from time to time, commencing in August 1771, which in their own books was titled simply " Patrick Downie of Prestonpans ;" and they produced a letter signed " Samuel Garbet and Company," dated 7th Jan. 1771, whereby *they* engaged to be answerable for any money advanced to Mr. Downie ; and likewise produced four bills, two of which were accepted by Samuel Garbet and Co., and the other two by Samuel Garbet.

Mr. Hogg farther claimed on the same ground, as trustee for Samuel Garbet and Company, who, he alleged, were creditors of Roebuck and Garbet, which company was continued by Samuel Garbet and Co., Roebuck being all the time a partner in that concern.

The case was reported by the Lord Ordinary to the Court. The Lords at first found for the appellant, on the ground that the partnership with Roebuck was dissolved, but on reclaiming petition the Court, of this date, pronounced this interlocutor : " The Lords having advised this petition, with " answers thereto for Matthew Bolton and other creditors of " Samuel Garbet, and having also considered the correspondence that passed between the petitioners and Messrs. " Garbet and Co. of Prestonpans and their managers, both " prior and posterior to the period when the petitioners " granted them the cash accounts, and that the articles and " agreement entered into between Dr. Roebuck, and Samuel " Garbet, partners of said company, dated 26th September " and 14th October 1766, was a latent and secret deed, unknown to the petitioners (respondents) ; and therefore " find that the petitioners (respondents) are preferable upon

Nov. 21, 1786.

1787. " the subjects and funds *in medio* to the private creditors of
 ——— " the said Samuel Garbet ; and remit to the Lord Ordinary
 BOULTON. &c. " to proceed accordingly."
 v.
 MANSFIELD, Upon the separate petition of Douglas, Heron and Co.
 &c. the Lords pronounced an interlocutor, of same date, in the
 Nov. 21, 1786. same terms.

And upon the petition of the respondent Mr. Hogg, they remitted the same to the Lord Ordinary, to do therein as he might deem just. The Lord Ordinary thereafter preferred Dec. 13, 1786. Mr. Hogg *pari passu* with the other respondents.*

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The only question is, Whether the property and effects at Prestonpans belonged, at the date of the sequestration awarded against Samuel Garbet, to him singly, or to him and Dr. Roebuck jointly, in copartnership? By the deed of 1766, it is most clearly shown, that the partnership which previously existed between them was thereby dissolved ; and that Dr. Roebuck had actually conveyed and disposed to Garbet his share of, and all interest in the stock, property, utensils, &c. at Prestonpans, which thereupon became vested in him only. And there is no evidence whatever to show that this was other than a real *bona fide* transfer of the whole estate from Dr. Roebuck to Mr. Garbet. Nor is it proved that, after this event and transaction, that the firm of Roebuck and Garbet was ever used, or that Dr. Roebuck ever interfered in the concern as joint proprietor or partner. On the con-

* Note on Lord President Campbell's Papers as to the grounds of the judgment in the Court of Session.

PRESIDENT CAMPBELL.—" See Downie's letter, 24th September 1766. Balance then as high as ever. This was two days before the dissolution on 26th September. Correspondence read over—in same tenor. Garbet's letters conceal dissolution. Doubt if partnership truly dissolved. Letters always mention a company.—Petitioners deceived.—Fraud.—Latent deed.—Garbet's creditors cannot take advantage of it."

LORD BRAXFIELD.—" Clear that former copartnery dissolved, and no new company created. But now clear for altering the interlocutor.—This agreement may regulate matters between those two persons ;—but of great importance to credit that the public should be apprised of any dissolution. Common mode is to intimate in Newspapers. Dr. Roebuck, in question with creditors, must be held as a partner still."

trary, Mr. Garbet assumed to be, and continued the sole owner, down to his bankruptcy. And it is no answer to this to say, that as by that deed, Dr. Roebuck was to have a share of the profits, that therefore he continued a partner, and as such was liable, because this was merely a share to be paid him for a certain purpose, and can have no more effect than if Garbet had engaged to give him an annuity, or to pay him a specific sum for renouncing the copartnership in his favour.—Further, there was no obligation in law, which made it necessary to publish the dissolution of the copartnery to the world; and the acknowledged fact of the partnership being laid aside, was sufficient notification to all concerned.

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Pleaded for the Respondents.—The agreement 1766 did not dissolve the copartnership between Dr. Roebuck and Mr. Garbet. The terms of that deed do not, in themselves, import such a dissolution, and the subsequent conduct of the parties shows it was not intended to have that result. The funds in dispute are therefore company funds, and must be applied, in the first place, to pay the respondents, who are company creditors. But even if this deed did, in point of fact, dissolve the company, still, in consequence of the concealment of this from the public, and the transacting business with the respondents as if the company still subsisted, was, on the part of Mr. Garbet, grossly fraudulent, so as to deprive his private and individual creditors from deriving any benefit from it. Because the dissolution of the copartnership never having been made public, but having remained a private and latent transaction, Dr. Roebuck stands bound to the respondents for their whole debt, reserving his relief against Mr. Garbet himself, or his creditors claiming through him; and, in virtue of this right of relief, the respondents, as creditors to the Doctor, are preferable over the funds in dispute.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For the Appellants, *Ilay Campbell, John Scott, Arch.*

Campbell.

For the Respondents, *R. Dundas, Edw. Bearcroft, W.*

Miller.

NOTE.—Unreported in Court of Session.

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 ——— ALEX. CUTHBERT, Esq., and CHAS. INNES, W.S. *Appellants*;
 CUTHBERT, Mrs. ANSTRUTHER PATERSON & PHILIP AN- }
 &c. STRUTHER PATERSON, Esq., her Husband, } *Respondents*.
 v.
 PATERSON,
 &c.

House of Lords, 23d April 1787.

ENTAIL.—Held, that where an entail was declared ineffectual against creditors, in consequence of not enumerating the irritant and resolute clause, and not being recorded, that it could not be held good against a purchaser of the estate.

It was decided, ante p. 51, in the entail of Paterson of Eccles, that the entail was not good to protect against creditors.

The estates were afterwards sold to the appellant, and, on examining the title, he was pleased to start the objection, that although the entail was found not a good entail against *creditors*, it did not follow that it was not a good entail against a sale of the estate. That by the act 1685, a distinction would appear to be made between creditors and purchasers. On the part of the respondent, it was contended that there was no proper distinction, such as the appellant founded on in the act, because tailzies not having inserted therein the proper irritant and resolute clauses, and not being recorded, are ineffectual both against purchasers as well as against creditors. Besides, Mrs. Anstruther Paterson is the last heir of entail in the deed, and could, even supposing the entail had been good, have sold the estate, and is now in a situation to give a good title to the purchaser.

Feb. 23, 1787. The Court, of this date, pronounced the following interlocutor:—" Having advised this information for the parties, " the Lords repel the reasons of suspension, find the letters " orderly proceeded, and decern."

Against this interlocutor the present appeal was brought. After hearing counsel, it was Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *R. Dundas, Alex. Wight.*

For Respondents, *Ilay Campbell, J. Anstruther.*

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HONOURABLE W. ELPHINSTONE,	-	<i>Appellant;</i>	ELPHINSTONE v. CAMPBELL, &c.
CAMPBELL and Others,	-	<i>Respondents.</i>	

House of Lords, 30th April 1787.

RIGHT OF VOTING.—Whether a conveyance of a superiority of lands held under strict entail, conferred a substantial right of voting; or was a mere nominal and fictitious creation of a right, resorted to for the purpose of giving a right to vote for a member of Parliament?

At the Michaelmas court, held for the county of Renfrew, within a few days of an approaching election of a member to serve in Parliament for the county, the appellant claimed to be enrolled as a freeholder, upon a life-rent right of superiority, and produced the following titles, viz. 1st, Charter by the crown in favour of John Shaw Stewart, Esq. of Greenock., one of the candidates, and an heir of entail to Sir John Shaw, late of Greenock, dated 3d Feb. 1774, containing, *inter alia*, the twenty merks land of old extent of Fynart, part of the barony of Greenock. 2d. Disposition by the said John Shaw Stewart to the appellant, the Honourable Mr. Elphinstone, in liferent, dated 16th April 1785, of the said twenty merk land of Fynart, with an exception of the property, which had been recently separated from the superiority, in the usual manner, by a trust feu. 3d. Sasine thereon in liferent, dated 22d April 1785.

It was stated by the appellant, that the lands contained in this disposition were retoured to a forty shilling land of old extent and upwards, by the retour of James Shaw of Greenock, dated, October 1594.

The respondents thought proper to challenge this title as nominal and fictitious, in so far as it gave the appellant no real property in the lands; but were titles devised and completed, solely with the view of voting.

The respondents farther objected, that when the statutes of 1661 and 1681, relative to the qualification of electors, were passed, the legislature had no idea, and did not foresee that so bad a use could be made by them, as to make them the handle of creating a number of freehold qualifications upon one estate, by granting wadsets and liferent conveyances of the superiority to different persons, merely to en-

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able them to vote in elections of members of Parliament. The idea of the legislature, in those days, was to annex the rights of voting to real landed property; the only superiorities then existing were real and substantial estates; and no such thing was then known or dreamed of, as for one and the same person to have three or more votes in a county, because he happened to be possessed of three or more forty shilling lands. But the objection came with the more force, when it applied to the granter of a liferent superiority, who was expressly prohibited from alienating, by the fetters of an entail, of the estate so alienated.

Mar. 1, 1787. The Court of Session pronounced this interlocutor:—"The
 " Lords having advised this petition and complaint, with the
 " answers thereto, replies, duplies, and writs produced; they
 " find the respondent's qualification is nominal and fictitious;
 " sustain the objection to his enrolment; find that the free-
 " holders did wrong in enrolling the respondent on the roll
 " of freeholders of the county of Renfrew; therefore grant
 " warrant to, and ordains the Sheriff clerk of the said county
 " to expunge the name of the said Mr. William Elphinstone,
 " the respondent, from the said roll, and decern."

Against this judgment the present appeal was brought.

Pleaded for the Appellant.—Although the appellant has only an estate for life in the lands on which he claimed to be enrolled as a freeholder; and although the yearly profits of that estate are trifling in point of value, yet he is equally entitled to the privileges of a freeholder, as any person who is vested in the fee of the estate of the greatest yearly value.

By the original constitution of Scotland, at least as far back as information can be got from authentic history or record, all the immediate vassals of the crown were obliged, without distinction, to give attendance in the King's great council of Parliament. The subordinate vassals neither were obliged nor had a title to appear in that assembly. They sat in the courts of the barons under whom they held their lands, and were understood to be sufficiently represented and protected by them. Even the taxation imposed upon land by Parliament was, in the first instance, laid upon the immediate vassals of the crown alone, although they were at the same time allowed, in their own courts, to levy a certain proportion from their vassals retainers.

In process of time the number of the immediate tenants of the crown became so great, and the estates held by some

of them were so small, as to render it necessary to relax, in some degree, from the rigour of the ancient law. Statutes were accordingly passed in the reigns of James II. and James the IV. of Scotland, dispensing with the attendance of all barons and freeholders whose estates were within a certain extent; but still every tenant of the crown, how small soever his estate might be, and whether the property or *dominium utile* remained with himself or had been granted to a subvassal for payment either of a feu or blanch duty, had an undoubted right, if he chose to exercise it, to attend and give his voice in Parliament.

At last, in 1587, a material alteration took place, by the introduction of representatives from each county; but although the right to vote in the election of such representatives was confined to those who were possessed of a forty shilling land in free tenantry, and had their dwelling within the shire; yet it was not required that they should be possessed of the property or *dominium utile*. The old idea of attaching the seat in Parliament to the immediate tenants of the crown was still retained, and of course a bare superiority entitled its owner either to elect or be elected. Neither was there any distinction between persons who has the right of superiority fully and absolutely invested in them, and those who had only right to it during their own lives.

Although the plan laid down by the statute 1587 for the election of commissioners from shires appears to have been abundantly plain, it should seem that several questions had arisen with regard to the right of voting in these elections. And, to prevent such questions in time to come, it was declared by the act 1661, cap. 35, " That beside all heritors " who held a forty shillings land of the King's Majesty in " *capite*, that also all heritors, liferenters, and wadsetters, " holding of the king, and others who held their lands formerly of the bishops or abbots, and now held of the king, " and whose yearly rent doth amount to ten chalders of " victual, or one thousand pounds (all feu duties being deducted) shall be, and are capable to vote in the election of " commissioners of Parliament, and to be elected commissioners to Parliament, excepting always from this act, all " noblemen and their vassals."

To discover whether an estate on which a vote was claimed by the owner of the superiority yielded ten chalders of victual, or £1000 Scots of free rent, might often be attend-

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ed with difficulty. Many questions might have still arisen, and much time been consumed in Parliament by trying the merits of controverted elections. The legislature, therefore, passed a new act in 1681, which, after reciting “ the
 “ great delay in dispatch of public affairs in Parliament, and
 “ Convention of Estates, occasioned by the controverted
 “ elections of commissioners from shires,” laid down a variety of rules for regulating these elections in time to come.

By this statute it was enacted, “ That none shall have
 “ vote in the election of commissioners for shires or stew-
 “ artries, which have been in use to have been represented
 “ in Parliament and conventions, but those who at the time
 “ shall be publicly infeft in property or *superiority* and in
 “ possession of a forty shilling land of old extent, holding of
 “ the king or prince, distinct from the feu duties in feu lands,
 “ or where the said old extent appears not, shall be infeft
 “ in lands in public burden for His Majesty’s supplies for
 “ four hundred pounds of valued rent, whether kirk lands
 “ now holden of the king, or other lands holding feu waird
 “ or blench of His Majesty as king or prince of Scotland.
 “ And that the apprisers or adjudgers shall have no votes in
 “ the said elections during the legal reversion, and that,
 “ after the expiring thereof, the appriser or adjudger first
 “ infeft shall only have vote, and no other appriser or ad-
 “ judger coming in *pari passu*, till their shares be divided,
 “ that the extent or valuation thereof may appear; and that
 “ during the legal, the heritor having right to the reversion
 “ shall have vote, and likewise proper wadsetters having
 “ lands of the holding, extent, or valuation foresaid, which
 “ rights to vote, proceeding upon expired comprising, adju-
 “ dication, or proper wadset, shall not be questionable upon
 “ pretence of any order of redemption, payment, and satis-
 “ faction, unless a decree of declarator or voluntary re-
 “ demption, renunciation, or resignation be produced; and
 “ that apparent heirs being in possession by virtue of their
 “ predecessor’s infeftment, of the holding, extent, and valu-
 “ ation foresaid, and likewise *liferenters*, and husbands for
 “ the freehold of their wives, or having right to a liferent,
 “ by the courtesie, if the said liferenters claim their vote,
 “ otherwise the *fiar* shall have vote; but both *fiar* and life-
 “ renter shall not have vote, unless they have distinct lands,
 “ of the holding, extent, or valuation foresaid; but that no
 “ person infeft for relief or payment of sums shall have

"vote, but the granters of the said rights, their heirs or successors."

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Upon this statute then, which is the latest act relative to the qualification of electors, it is clear, 1st, That it adhered to the ancient law and practice, by giving the right of voting only to those who were infeft and in possession of lands held by them immediately of the king or of the prince; 2d, That it gave that privilege to those who were so infeft and in possession, although the right was only a naked superiority, and the property or *dominium utile* was vested in others holding under them. 3d, It gave the right indiscriminately to those who were infeft and in possession of such superiority, in virtue of a proper wadset, redeemable for payment of a certain sum, or in virtue of a liferent right to terminate at their own death, as well as to those who had the absolute fee of the superiority vested in them, and were able to dispose of it, or to transmit it at pleasure, without the possibility of challenge. 4th, It made no distinction, whether the profits arising from the superiority on which the vote might be claimed were great or small. In that respect, a superior who could claim a feu duty from his vassal of £500 per ann.: and another who could only demand a penny Scots, a pair of spurs, an ounce of pepper, or the blast of a horn, stood upon the same footing; and, lastly, It made no distinction whether the right of superiority, either in fee or in liferent, had been acquired merely with the view to obtain a vote in the election of a commissioner, or for other purposes. But, hence, it necessarily follows that a liferent of a naked superiority, though attended with no profit whatever, and although purchased and obtained in gift from the person in whom the fee was vested, for the sole purpose of enabling the liferenter to elect, or to be elected a commissioner to Parliament, did, by the act 1681, constitute a legal and perfectly unexceptionable freehold qualification.

Supposing therefore the case to be quite a new one, the appellant should humbly apprehend that no good objection could lye to his right to vote. The case, however, is far from being of that sort. On the contrary, it has been established by a variety of decisions of the Court of Session, and by several judgments of your Lordships, that liferent rights of superiority, though affording the most trifling yearly profits, and although obviously created for the sole purpose of enabling the grantees to vote in elections for members to serve in Parliament, afford unexceptionable freehold qua-

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 fictitious.
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 &c. Thus in the cases of Ferguson, 20 July 1746, and the
 Stewart and Hay, 24 June 1747; Forrester v. Fletcher in
 1755; and case of Campbell of Shawfield, 1 Dec. 1760,
 House of Lords, and other cases, the same objection now
 made was repelled.

Pleaded for the Respondents.—1. Because the lands on
 which the appellant claimed a right to be enrolled as a free-
 holder, being settled under the fetters of a strict entail,
 with the usual prohibitory, irritant and resolute clauses,
 against alienating, contracting debt, and altering the course
 of succession, the said John Shaw Stewart, Esq. was ex-
 pressly prohibited and debarred from conveying the said
 lands to the appellant for any purpose whatever. 2. Be-
 cause although it may be *jus tertii* for the respondents, as
 freeholders, to maintain a challenge competent to heirs of
 entail, there can be no doubt they were at liberty to show
 that the title is defeasible at the pleasure of third parties,
 which every qualification upon an entailed estate unques-
 tionably is. 3. Because the said title appears on the face
 thereof to be *a created* title, and granted with a view solely
 of giving the appellant a freehold qualification, in order to
 enable him to vote in the election of a member to serve in
 Parliament for the county of Renfrew, without conferring
 any beneficial or patrimonial interest whatever; and is there-
 fore *nominal* and *fictitious* in the direct terms of the oath
 introduced by the act 7 of Geo. II., and contrary to the spi-
 rit and meaning of all the other election laws. 4. Because
 such fictitious and fraudulent operations seldom fail to throw
 the title-deeds of estates into great confusion, and produce
 numberless questions concerning the rights of property and
 succession in Scotland, the consequences of which are ex-
 tremely injurious. 5. And because if such rights were to-
 lerated by law, and established into a system, the privileges
 of the real freeholders would be annihilated, and the power
 of electing the representatives for counties in Scotland
 thrown entirely into the hands of a few great families, most
 of whom are otherwise represented, and the ancient princi-
 ples of the constitution, though fixed at the Union, and con-
 firmed since, would be reversed.

After hearing counsel,
 Lord Chancellor Thurlow said,

LORD CHANCELLOR THURLOW :—

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“ The great importance of this cause, and its general reference, as has been observed by the counsel upon both sides, to the laws of Scotland with respect to sending members to Parliament, will undoubtedly entitle it to every degree of the most anxious attention which your Lordships can possibly bestow upon it.

“ The manner in which it struck my mind, laid me under no small difficulty and embarrassment, whether we could enter into the question of fraud in this case. It strikes the mind with indignation, where a fraud upon the law has been actually committed, that the court, and judges composing that court, are the only persons, and should be the only single persons in all the country, that are unconscious of the fraud, and incapable of going into it, and consequently not able to decide upon it ; that would be rendering justice deficient, and embarrassing the court by its own rules of decision.

“ Where there is actual fraud, your Lordships would certainly be anxious to pursue that fraud with all the diligence and effect it can possibly be pursued with, in order to do justice in the matter ; when I use the word fraud, I lie under the necessity of explaining that I speak of fraud purely in the legal sense. It happens, that by the law of Scotland and of this country, and of every country in the world, there is a great number of things that are called fraud in law, which will carry along with them no degree of baseness or dishonour ; therefore, I hope I shall be understood as speaking of this *subject*, and by no means conveying the slightest imputation with regard to the *person* whose name has been so often mentioned, and who has been spoken of in very high terms in this case, and I make no doubt he deserves to be spoken of in the highest terms as a man of honour. I have not the honour to know him nor Mr. Stewart, but it would be extremely hard, when one is using phrases of this sort, that they should be looked upon as personal ; when I say, this is a practice to disappoint the law of the land, and in that way constitute a fraud upon it, *that* is my true meaning.

“ Upon the other hand, I should be extremely sorry to proceed by any rule, in the discovery of fraud, which could be so gross and so extensive as to cut down those votes, which, by the law of Scotland, undoubtedly are admissible ; for it has been very well observed ; and properly agreed by the counsel upon both sides, that your Lordships do not sit here trying this cause as a House of Parliament, but you sit here as a Court of Session merely ; and you ought to pronounce no judgment in this place but that which the Court of Session ought to have pronounced in the court below ; and, for that purpose, you should lay out of your consideration every view of policy, every view of expediency,—you should lay out of your consideration every

1787. circumstance and ingredient whatever, except that which the letter of the law prescribes.

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“ In considering this case, I take it to be extremely clear, that, by the law of Scotland, the estate which is pretended to be conveyed in these deeds, if it be a real estate, taken and enjoyed by the grantee of that estate fairly and *bona fide* for his own use and benefit, does give a vote for a member to serve in Parliament.

“ My Lords, by the ancient law of Scotland, as your Lordships perfectly well know, every vassal of the crown, every baron, properly speaking, appeared in Parliament, and his sub-feus were, in ancient times, not regarded much more than tacks are now. He represented the whole land ; it was of no consequence to his title, for appearing in Parliament, how much of the beneficial interest was in him ; he represented the whole land. Afterwards, when the attendance of the lesser vassals or barons, who held of the crown, was dispensed with, and they appeared only by their representatives, those who voted for the representatives, voted for them in the very same right that they sat in Parliament by, consequently, the right to vote for the representative was in the immediate tenant of the crown, let those who held under him enjoy ever so much of the beneficial part of the estate.

“ In 1681, when the mode of electing in Scotland came to be settled, those principles were exactly followed, and the right of voting was given either to the wadsetter of a superiority, or to the liferenter of a superiority, and it was given to them without regard to the quantity of real and beneficial interest which they held in the land.

“ In the times I am alluding to, certainly the object of sitting in Parliament, however it might touch the minds of individuals, did not apply to them in the same way as, from the lapse of time and change of circumstances, it has done since. The utmost point that then could strike the ambition of a gentleman, was the honour of representing a considerable number of people in the county in which he lived, and of being preferred by them to that seat in Parliament. That ambition there was, but it did not go the length of dispensing with the constituents paying the expenses of their representative in Parliament. I speak only of what took place after the act 1681, if I do not confound that statute with the 12th of Anne; but, from that time to this, the law has certainly received no change whatever; because, though a great many acts of Parliament have been made for securing due observation of the law, yet the law, as made in 1681, none of them offer to make a change in it, nor by construction can be understood to have made a change. Your Lordships will see what the law was in 1681. It is true superiorities gave the vote, it is also true every man who had such an estate had a vote, and it was in the contemplation of the law, as it was regulated in 1681, that the right of voting should be preserved to each individual ; I mean in contradistinction to this, the qualifications which, your Lordships know, is forty shill-

ings land of old extent holden of the king, or £400 of valued rent as a superiority, gave a right of voting;—but no one person, if he had 40 or 500 such estates, which, by being divided into so many parts, would have given so many votes, could, while the estate was in him, be entitled to any more than one vote. At the same time, if the estate came by accident to be divided, each of the persons to whom it fell in that manner would have a right of voting

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“Hence your Lordships see there are two points equally deserving your attention as a court of justice. I am not considering now whether political power should be in proportion to the extent of property, or whether the man who held an estate that contained the 40 or the 500 votes should have them all. That is not our business,—we sit as a court of justice, to carry the law as it stands into execution; and there are two points in the law, as it stands, which it behoves your Lordships anxiously to see executed, as far as the rules of the law can go. The one is, that every person who has an estate to which the law annexes the vote, should be enabled to give the vote; the second, that no person should be able to give more than one vote for the estate so abiding in him. It was argued, but little insisted upon, nor do I believe it was capable of being much insisted upon, that the difference of times between 1661 or 1681, and the present hour, made a difference in the right of voting; that because at that time there was no such practice as that of stripping the estate of all its beneficial enjoyment, and afterwards of conveying out the mere superiority for the purposes of supplying votes, so it could not then be in contemplation to give the right of voting to the description of votes now brought to the bar. I confess my opinion, as far as that goes, is clear, that by the act of 1681 they meant to give the privilege to the *slightest estate* which, upon paper, could be drawn forth within the letter of the statute of 1681; so that if a man, entitled to a forty shillings land, were to feu it out, taxing the casualties, or charging them in any other manner, so as to reduce the estate to a superiority of but a penny value yearly, I take it to have been the intention of the statute of 1681 to give to that estate a vote. Now, if the case were supposable, I would say, that when the estate had been so stripped as to leave no actual value in it of above a shilling a year, the person having such an estate would be entitled to vote. As to what they call wadsetting, your Lordships know perfectly well that it is the conveyance of an estate liable to be enjoyed so long as it is *not redeemed*, but liable to be *redeemed* upon payment of a sum supposed to be advanced upon it; and if the sum advanced had been twenty shillings, or reduce that to sixpence, or if it had been ten shillings, or lower down, so low as a penny Scots, imagining the case of such a wadset as that to be clear of any fraudulent purpose, my opinion is that wadset gives the right of voting.

“I will put the case, if possible, even stronger than that,—I will suppose that a gentleman of estate, who does not care a farthing for either of the candidates, or for politics, should resort to the opportu-

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nity of selling the superiorities of it,—I do not know that the act of 1681 would prevent him from doing so, by the means of feuing out the estate, and then sending those superiorities to market, in order to be purchased out and out by other persons for their own benefit, according to the law of villinage; and the right of representation in Scotland has most lamentably and unfortunately fallen off its ancient basis, in so much, that the whole value of the landed property in that country, speaking largely and generally about it, may be in the hands of those that would have no concern whatever in the choice of the representative of the county, which might be placed in the hands of men who have no earthly estates but such as I have been describing,—*that* certainly was not the object of the law; but if it be a political object, and an honest object, to give to the land of Scotland its due weight in parliamentary representation,—I am afraid that it is not to be obtained by a judgment of any court of law, but resort must be had to Parliament, to cure the great mischief that has happened to the constitution of that country, as well as other countries, where the change of circumstances has been such, that the rule and order of government not being changed conformable to it, things have been turned so absolutely round, as to disappoint all the good sense and sound policy upon which the constitution stood originally. I have been anxious to state this as to what I look upon to be the right of voting in Scotland. I am afraid, in practice it has been reduced to the condition of a burgage tenure here; and when I mention that tenure, it may be necessary to make some observations upon it.

“ I know the House of Commons is a competent Court to decide upon all questions of the election of their own members, and there stands upon their journals various decisions supporting burgage tenures, which I do not mean to impeach, or throw the smallest reflection upon in the world.

“ There is a latitude and sovereign power that belongs to the House of Commons, that perhaps never ought to bind itself by those narrow rules a court of justice should go by. If the title to a seat in Parliament had been in England, as now in Scotland, referred to the decision of a court of justice, we might, without complaining, venture to guess that a gentleman could not have been at liberty to send his steward with ten or a dozen parchments, to be distributed among as many voters round a green table, and then to pick them up after the election was over. I rather believe *that* could not have happened; but whether there be or not that peculiarity in the burgage tenure of England, it is abundantly clear an abuse like that does not exist in the constitution of Scotland; it is also undoubtedly clear by the statute of 1681, and various acts of Parliament, by which they have tried to secure it against fraud since that time, that how slender soever the beneficial interest may be that is taken by the conveyance, it must be taken *bona fide*, and be the absolute property

of the person pretending to property in it; and, consequently, if there be any means of impeaching it with fraud, those means are open with respect to this species of burgage tenure. There was a great deal of dispute at the bar, upon what should be deemed a nominal and fictitious vote, created or reserved only for the purpose of giving a vote at the election, and not a real and true estate in the grantee of the estate, for his own use and benefit only, and for the benefit of no other person. I speak of the words of the oath, for whether the words of the oath alter the law or not, and I think they do not alter it, they are certainly a parliamentary recognition of what the law was at that time. It seems, therefore, upon every question of that sort that arises before the Court of Session, the *single* point for them to try is, not what is the extent of the estate, but whether that estate is vested in the grantee *bona fide*, and is a true and real estate for his own use and benefit only, and for no other purpose; for if the *jus disponendi* remains in any other person, it is in vain that the parchment conveys the right to him, for the real use of the estate remains in another, and that objection to the estate is now competent.

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“ I did put the case to the gentlemen at the bar, of one species of title,—I admit to be a good one,—it is the wadset. I will suppose an estate of sixpence a year value, were mortgaged for ten shillings, at 5 per cent, and that the supposition was, that twenty or thirty pounds had been paid for making out all the charters, sasines, and other instruments, by which the estate was to be conveyed away, and the question was to arise merely upon the state of that transaction; what would be the effect of it? I did not perceive it was argued a moment, but *ex facie* upon such a transaction as that, it would be deemed an intentional evasion of the law upon the part of the granter and grantee.

“ It is argued, that in Scotland trust could only be proved by writing, and, consequently, there could be no means of proving the granter retained any interest whatever in the estate, unless it were so proved. I do not know of any proposition that appears to me so perfectly contrary, not only to the common and received notions of law, but even to common sense, and, more particularly, the common sense requisite upon the present occasion.

“ By the nature of the thing, the writings must be all clear, but the question made by the statute is, Whether those writings are sincere as well as clear—whether they convey an estate for the sole use of the grantee, or for the use of the granter? It is said, *that* must appear out of the writings themselves. It is manifest the question is a question of fraud; and till I heard it argued here, I never heard that a question of fraud was not to be made out by a parole evidence, proving such facts as infer fraud. In the case of such a wadset, my idea is, that it would be a fraudulent vote, though he had taken an estate sufficient as the law

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of Scotland says for the purpose of voting, but had taken it in such circumstances as showed that it was not calculated to serve his own purposes, therefore, it afforded pregnant evidence of fraud. This is a case where there is a liferent of a shilling value, that is, it is absolutely nothing. I am speaking of the appellant's title. But if ever such an estate was bought out and out, with a view, not to the enjoyment of a shilling a year, but for the purpose of enjoying the franchise, which, by the constitution of that country, is annexed to that estate, provided that is distinctly and clearly done, I should apprehend that estate would convey the vote.

“ But if a person conveys the estate to another, who, instead of paying the purchase money, and instead of paying the expenses of conveying it, holds it at the expense of the granter himself, and more particularly so, if he held it under an honorary engagement, that he could never disturb the title deeds of the granter, (there are a thousand ways it might be stated), in that case, the person that holds it would be thought of in the most reproachable manner in the world, if he was to offer to interrupt the title of the granter; if he holds it under an honorary engagement the most imperfect in point of actual obligation, in my opinion, he holds it fraudulently. The right of using it is not in reality, or in fact in him. Rumour says, that in this and in that county in Scotland, great lords, who have vast estates, so as even to divide the county among them, have taken upon them to convey by parcels the superiority to two or three hundred different persons, for the purpose of giving them what have been called confidential votes. If they are called confidential, I should have no difficulty in saying what I think of them, namely, that they are no votes at all; because, from the very moment a man holds the estate with any degree of confidence, there is a want of a legal and complete right. I am glad it has occurred to me to mention it here; because it is a matter very important for your Lordships' consideration, if those estates, by any of the confidential holders, were to be withheld from the family that granted them, that family has no way whatsoever to get them back again, no process of confidence would enable them to get them back, they would be obliged to prove a fraudulent conveyance; and the law would not permit a man to plead upon his own fraud. The estate therefore could not be drawn back by the granter, upon the plea of fraudulent confidence, and yet it is not held by the grantee legally. I do not care for pointing out by what means, but this information has been conveyed to me in such a form, that I verily believe it will not be long before your Lordships will hear of disputes to a great amount, turning upon the grounds I am now stating. It happened, not a great while ago, that the estate of no inconsiderable family was thus granted out, and the gentleman did not think himself at liberty to avail himself of it, he was prevailed upon not to do it; but if he had thought proper, he might have availed himself of it, and have kept the estate.”

“ This brings me to the consideration of the vote now in question. The fact seems to be admitted to a certain extent, I wish it had been more fully so. This estate of Mr. Stewart is an estate held under the strictest entail known by the law of Scotland. He was under the necessity, in the first place, to violate the conditions of that estate, by making the subinfeudation to a person in confidence. I hope he knows whom to trust ; how he is to get *back* that estate is more than I know.—After he had made that subinfeudation, he conveys the superiority to Mr. Elphinstone and several other persons; those conveyances were also breaches of the entail, to which the heirs of entail were not bound to consent : and if an heir of entail, after he had come to such an agreement, should think fit to resile, there could be nothing to stop the declarator. You cannot allege your own fraud to stop a declarator at the instance of another.

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“ Mr. Elphinstone is supposed to have taken this estate, subject to be called back in this manner by the heir of the entail.—It is gravely alleged, upon the part of the appellant, and it is certainly true, nobody can challenge the estate but the heir of entail. If he was to challenge it, he could get back the estate, but till that is done the estate does remain in the estimation of law, the estate of the voters ; but the question is, not whether it is not in the estimation of law the estate of the voters, but whether, according to the tenor of the transaction, a court of justice can or cannot discover that this is a species of estate which Mr. Elphinstone would not have taken upon his own account, or upon any account, but that of the granter's request. If you were to lay it down as a rule in the case, that, provided he had paid 10 guineas for the estate, or 20 or 30 pounds for the conveyance of it, that should prove it a *bona fide* estate, you would decide upon one of those objections, but not upon the other, and lay down a general rule which I certainly do not. I am not laying down a rule of law ; I am not laying down a rule of evidence ; I am not laying down a rule of presumption, nor, in short, any one rule by which the court can be afterwards bound. It must be upon the general state of the transaction, that the court can collect that the estate, instead of being intended to be used or disposed of by the grantee, was intended between them to be at the use and disposition of the granter, and wherever a case affords circumstances sufficient fairly and roundly to raise that presumption in an unanswerable degree, or to raise it in a degree which the party himself cannot answer, in such a case as that, the vote must be held to be void.—Some cases have been quoted, as decided by your Lordships, in which it is supposed to have been laid down as a rule, that the party himself could not be examined as to the *bona fide* manner in which he held the estate. Cases were adduced, which *prima facie* go some way towards affording an inference that such were the ideas in your Lordships' minds at the time of that decision. I beg, in the first place, to remark, that you have laid down no such rule by any de-

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oision, consequently, when these cases come to be argued, if ever they should again, the question will not be, Whether it is absolutely true, that no man can be examined that has once taken the freeholder's oath? Many of them do not choose to do it, and I do not wonder at it. For though no disgrace or baseness could be imputed to a making a vote of this sort, it cuts a little closer, when the voter comes to take the oath. I do not wonder that a man of honour should say, as was said at the bar, that he took this estate as a real and true estate, for his own use and benefit only, and not another's. But I doubt whether Mr. Elphinstone would have sworn so in this case. I am sure he would not, if he had felt in his own mind any honorary obligation, even though not a legal one, to use or to dispose of that estate at the requisition of the granter. If your Lordships will cast your eye over the statute, you will find that the whole scope and object of the oath was, that the Court of Freeholders (who had not the means of a long examination, and cannot pursue the case in the manner a Court of Justice would, and are to pursue it by such short means as they have in their power) may have reference to the oath of the party. Are there words in this statute that can prevent the Court of Session from going farther in such a case as this? If there are any in it, it is more than I yet know or am inclined to agree to, unless I find that the cases, taken altogether, do absolutely fix it upon me by the authority and reasons of them. It is every day's experience in every court of justice in the world, (and there is no reason for the contrary, where a man is giving testimony upon an estate or other interest, which has been drawn into question), and I know of no interest whatsoever, which can prevent a man being again examined after taking an oath. A case occurs to my mind, upon a policy of insurance. A great number of underwriters may have actions brought against them upon the terms of the agreement, it would be strange, if the broker or other witness examined in the one cause, could never be examined again; it would be extraordinary, if he could say, I have been sworn in a cause already, you cannot examine me again. In the Court of Chancery there is no such rule; a person being sworn upon one cause, will not prevent his being examined on another. It appears to be impossible that such a maxim should have been set up. I do not see upon what ground it would have been necessary to the decision of these cases, nor upon what ground it is possible to declare that a man must not be examined in what they call a judicial examination, because he has once before taken the freeholder's oath. I am inclined to believe, if they examine accurately those cases, they will find, that the objection was to the form of particular interrogatories, and not to be bottomed upon that principle, that a man who has been examined once, can be examined no more.

“ My Lords, this case comes before your Lordships under particular circumstances. A great many such cases were under the view of

the Court of Session at the same time. In some of them evidence was given, and they were argued in the Court of Session at large; but this was argued *ore tenus* without evidence or fact stated in writing. Without a distinct view of the evidence that was given in the case, particularly where it is attended with such doubts and nicety as this, I should be extremely sorry to be forced into a decision, where every article and every circumstance of it was not so perfectly before the Court as it ought to be, in order to found the judgment which your Lordships ought to pronounce upon it.

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“No case can come before this House, where the utmost anxiety should not be used to adhere closely to the rules of law, and if there be a case distinguishable from another in that particular, I should say this is one which, by the peculiar constitution of the kingdom of Scotland, the Court below ought to judge of with the utmost attention, as the right of a seat in Parliament may depend upon it, and upon account of the great and momentous concern which is involved in it. Therefore, I will not propose more to your Lordships, than to remit this back to the Court of Session, with a view they should proceed to the examination of all the points in it, that their decision may be founded upon the evidence stated amply and decisively before them, and they should decide what steps ought to be taken in the matter.”

LORD LOUGHBOROUGH,

“I shall not detain your Lordships long, by entering into any state of the law, or discussing, to any extent, the circumstances of the case. That has been done so fully and ably by the noble and learned Lord upon the Woolsack, that I shall content myself with expressing my sense of the great obligation which the House and the public owe to the noble and learned Lord, for so clear and luminous a deduction of the law of Scotland, with respect to the right of election, guarding it against any supposition, that there can be an intention to innovate upon the established right of election, as it stood at the Union, and at the same time, doing the Court of Session that justice which is due to them for the attempt they have made in the present case, to have the law executed according to its true spirit, showing their intention not to pervert the precautions the law has used to secure the real right of election against the devices used for creating fraudulent qualifications. I perfectly concur with the noble and learned Lord. The direct decision of the question here would be premature; and, therefore, I must express my assent to the noble and learned Lord’s motion, to remit it to the Court of Session, that they may hear the points further, and go through it again, and determine it in the manner they shall see proper.”

The question was then put by the Lord Chancellor, and carried unanimously, That the cause be remitted back to the Court of Session in Scotland, to hear parties further there-

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upon, with liberty to receive such new allegations and evidence as the occasion may require.

It was therefore ordered and adjudged, that the cause be remitted back to the Court of Session in Scotland, to hear parties further thereupon, with liberty to receive such new allegations and evidence as the occasion may require.

For the Appellants, *Alex. Wight, Wm. Adam.*

For the Respondents, *Ilay Campbell, R. Dundas.*

THE GOVERNOR and COMPANY of the BANK	}	<i>Appellants ;</i>
of ENGLAND, - - -		
WILLIAM PULTENEY, Esq. - -		<i>Respondent.</i>

House of Lords, 14th December 1787.

HERITABLE SECURITY—RANKING—INDEFINITE PAYMENTS—ASSIGNATION.—A creditor held an heritable security for repayment of his advances, to the extent of £12000. He also held an adjudication debt against the same debtors, for a bank debt paid by him for them, which was not included in the heritable bond. On the bankruptcy of the debtors, and ranking and sale of their estate, Held, that he was entitled to impute indefinite payments made to him to his least secured debt, so as to make the heritable bond cover the whole debts due to him within the amount of that security ; and, therefore, that he was preferable, both for the balance due on the bond debt, as well as for the adjudication debt. In this last debt, another party was bound as co-surety. Held, that on payment, he was not bound to grant the creditors an assignation to his claim.

Robert and William Alexander, late merchants in Edinburgh, having become bankrupt, an action was commenced in the Court of Session, for the purpose of ranking their creditors upon the price of their estates, which were brought to judicial sale.

Among the creditors appeared the respondent, who claimed, in virtue of an heritable security, a preference on the estate of Cluny, situated in the county of Fife, for a debt of £12,000, or, at least, for the balance remaining due by the bankrupts.

The debt was contracted in the year 1769, by Mr. Pulteney accepting bills drawn upon him by the bankrupts for the following sums :—

21st Dec. 1769.—£1500, payable to J. Campbell, Esq. of the Royal Bank of Scotland, six months after date.

21st Dec. 1769.—£1500, payable to the said John Campbell, nine months after date.

29th Dec. 1769.—£1500, payable to the said J. Campbell, six months after date.

29th Dec. 1769.—£1500, payable to the said J. Campbell, nine months after date.

30th Dec. 1769.—£6000, payable to the bankrupts themselves, and endorsed by them to James Spence, Treasurer of the Bank of Scotland, six months after date.

In security of these bills, amounting in whole to £12000, the bankrupts granted an heritable bond, which specially recited the bills above mentioned, and then followed this personal obligation, “ And whereas the said Wm. Pulteney, Esq., at adhibiting his acceptance to the said five bills, had “ no value in his hands belonging to us the said Robert and “ William Alexander, or belonging to the Company now “ carried on by us, under the firm of William Alexander and “ Sons ; but did the same at our desire, and for our use, upon “ condition of our granting him the security underwritten. “ Therefore wit ye us, the said Robert and William Alexander, to be bound, as we hereby bind and oblige ourselves, “ our heirs and executors, to content and pay to the said “ William Pulteney, Esq., his heirs and assignees, the fore- “ said sum of £12000, in the months and at the terms after- “ mentioned, viz. the sum of £1500 upon the said 21st day “ of June next, to the end that he may apply the same for “ retiring the bill first above narrated. Item, the sum of “ £1500, upon the said 21st September next, to the end “ that he may apply the same for retiring the second bill “ above narrated.” And so on, thus enumerating the whole bills.

The bankrupts, by the said heritable bond, having bound themselves to infest and seize Mr. Pulteney in the estate of Cluny in security and payment; he was infest, and the infestment duly recorded.

The repondent likewise produced in the ranking an adjudication for payment and relief of certain other debts in which he stood concerned with Messrs. Alexander, one of these a debt of £3009, due to the Royal Bank of Scotland, for which the respondent had become bound as security in 1772.

The appellants had an heritable security granted to them over the estates of Cluny, for a debt due to them, of date subsequent to the above bond, granted to Mr. Pulteney, and

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were thus interested in seeing that no more was ranked for on that estate than was due on the respondent's bond.

The claim lodged for the respondent claimed the balance due on the heritable bond debt, amounting to £6000, all the other bills under the heritable bond having been paid.

To these claims, so far as the respondent's heritable bond was concerned, the appellants and other creditors objected, stating, that the bond had been granted for the respondent's relief of five acceptances, therein particularly mentioned, so in a settlement of accounts, which took place between him and Messrs. Alexander, in April 1775, it was admitted, that these five acceptances had been retired by Messrs. Alexander, and three of them, including the one for £6000, had been delivered up by the respondent for cancellation. And, therefore, that the heritable security was extinguished, the debt being paid. The respondent answered, That although the five bills were nominally retired by Messrs. Alexander, yet they had been truly and substantially paid by his, the respondent's money, or by his granting new acceptances, which came in the place of the original ones; and, in particular, he endeavoured to show, from written evidence produced, that this was the case with respect to the acceptance of £6000.

July 18, 1780. The Lord Ordinary found sufficient evidence that the bill for £6000 sterling, was afterwards retired and paid by Mr. Pulteney, and therefore found that the bond and infestment are still in his person a subsisting security for relief and repayment of the contents of the said bill, at least, to the extent of the balance truly due, by Mr. Alexander to him, upon a fair accounting. This case was appealed to your Lordships, but affirmed.

The respondent then urged that his adjudication debt for £3009 was also entitled to be included under the heritable bond, so as to give it a preference over sums due to other creditors.

To this it was objected, that although the respondent might have a good claim to be relieved of the £3009, for which he stood bound, yet, as this claim had no connection with his heritable security, and did not exist till some years after the date of that security, he could only be ranked thereon as a common personal creditor.

July 14, 1783. The Lord Ordinary, of this date, found, " That Mr. Pulteney is entitled to be ranked for payment of the sums due by Messrs. Alexander to the Royal Bank, for so far as he has paid the same, and for relief thereof, so far as still

“ unpaid, and shall not be drawn by the Royal Bank as cre-
 “ ditors, producing an interest in this ranking, and finds,
 “ that the heritable bond will extend to his claim, for pay-
 “ ment and relief of this engagement to the Royal Bank ;
 “ and that to the extent of the £6000 already sustained by
 “ the Court, and interest, without prejudice to Mr. Pulteney,
 “ to show that the bills for the remaining £6000 contained
 “ in the heritable bond were retired by him or his effects.”

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In a representation, it was stated, that in the debt to the bank, a Mr. Aitchison was interested as a co-obligant, and the question was urged, how far the respondent was not, at least, bound to grant an assignation to the postponed creditors.

The Lord Ordinary, (4th Dec. 1784), “ In respect Mr. Pulteney is claiming to be ranked on the funds of the principal debtor, finds, that he is not obliged to grant any conveyance to the creditors at drawing his payment.”

In a reclaiming petition, it was contended, that Mr. Pulteney could not apply the sums paid him towards special debts, namely, the bills, so as to make the heritable bond available for more than was due by it, but was bound to apply those payments to the special debts for which they were paid. The respondent answered, That he was entitled to apply any money he had received from Messrs. Alexander, in the course of their various transactions, to that debt which was least secured ; and to keep up his heritable security to the amount of the balance due to him. That this had been settled by the former judgment ; and, finally, That he was not bound to grant any assignation to the appellants for whatever sum may be recovered on that bank debt, out of his co-obligant's estate, who was only a co-cautioner and surety.

The Lords adhered to the interlocutor of the Lord Ordinary reclaimed against. Mar. 4, 1785.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The debt due to the Royal Bank of Scotland, originally constituted by a bond for £5000, by Messrs. Alexander and John Aitchison, and for which, the respondent and Alexander John Alexander of Grenada, gave a corroborative security in July 1772, has no connection whatever with the bills, for relief whereof the heritable bond was given. It was not even brought to the credit of the respondent, in the account fitted between them in April 1775, he cannot therefore extend his heritable bond, so as to make it cover that debt, but must rank for it as a personal creditor.

Supposing the respondent entitled to hold the debt in

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question, as covered by the heritable security, he ought to be ordained to assign his claim against Mr. Aitchison's representatives, who are quite able to pay, and ready to meet the demand, so as the other creditors may derive the benefit of this claim.

The respondent founds on the rule of law, that every creditor is entitled to apply indefinite payments in extinction or relief of the debt least secured. But, admitting the rule of law, still it will not avail him in the present question, because, in cases of bankruptcy, matters must be taken as they stood at the time of the bankruptcy; and, in this case, it will be admitted by the respondent, that at *that time* he had not made any payment to the Royal Bank, on account of this debt of the Alexanders. He was indeed bound for the debt, but he could not become creditor to Messrs. Alexander, until he was compelled to pay it. The debt, therefore, did not exist at the time when the supposed indefinite payments were made by Messrs. Alexander to the respondent, and, of course, these payments could not be applied to that debt. Because the payments to the respondent were all made prior to the account fitted in April 1775, and must therefore be applied to the debts stated as due to the respondent on that account. By that account there is a balance struck of £4012. 11s. 7d. due to the respondent, which, by a subsequent account, likewise fitted and signed, but bearing no date, is extended to £5425. 2s. 6½d., subject, however, to contingent deductions. These accounts conclusively show, that the payments cannot and were not taken and deemed as indefinite payments.

Pleaded for the Respondent.—1. Whether the respondent shall be entitled to include in his account the debt due to the bank, the whole of which is now paid, is already determined by your Lordships, by the affirmance on appeal, of the interlocutor first above mentioned (18 July 1780). It is evident that where the question was, Whether the heritable bond should stand as a security to the respondent for the balance of his account, it was open to the appellants to have argued, as they do now. They might have objected individually to the articles of which the debit side of that account was composed. They might have said this article was posterior to the heritable bond—was not in the view of the parties at the execution of it—had no connection with it—and if it was open to them at that time so to argue, it cannot be open to them now. In fact, they did so argue it in that way as the pleadings in the former case show. In his answers to the ob-

jections given in he says, p. 24, "The next article is the debt for
 " £3009. 3s. 1d. which Mr. Pulteney is bound to pay to the
 " Royal Bank, and it is said, as the bank has claimed for this
 " debt and will be ranked for it, Mr. Pulteney, the cautioner,
 " ought not also to be ranked. In answer to this, he admits
 " that the debt cannot be ranked so as to draw twice in the
 " ranking, but as he is liable to the bank, he apprehends he
 " is clearly entitled to be relieved, and must be ranked ac-
 " cordingly; and so far as he is obliged to pay he will be
 " entitled to compensate what is due to him with part of
 " the sum advanced for him by Messrs. Alexander, without
 " encroaching upon his heritable security. The creditors
 " say that this is in effect stretching his heritable security so
 " as to cover the bank debt. But with submission it is a
 " mistake to view the matter in that light; for he is only
 " using the privilege which by law is competent to every
 " creditor in the like circumstances, of applying any indefi-
 " nite payment made in extinction or relief of the debt least
 " secured." Thus showing that the point was actually in
 issue in the former suit, which ended by the judgment of
 your Lordships. It therefore follows, that if the appellants
 are at liberty to object to the articles on the debit side of
 the account, on the single ground, that they are not the bills
 mentioned in the heritable bond, and have no connection
 with them, then your Lordships' affirmance of the interlocu-
 tor of 14th July 1780 in the former appeal, may be in sub-
 stance reversed. For if every article except that bill be
 struck out, and the indefinite payments thereby necessarily
 applied to that bill, then the heritable bond will stand as a
 security for the balance on that bill only, and not for the ba-
 lance truly due on a fair stating of the accounts, which would
 be a plain subversion of the interlocutor affirmed by your
 Lordships.

Upon the second question, Whether the respondent be
 bound to assign his right of indemnity against the repre-
 sentatives of Mr. Aitchison, it is unnecessary to argue much?
 It is sufficient to say, that Mr. Aitchison was a mere cau-
 tioner with himself in the debt due to the Royal Bank only,
 but in no manner connected with the other course of tran-
 sactions had with Messrs. Alexander, for which they granted
 him the heritable bond. Had Mr. Aitchison paid the whole
 debt due to the respondent, the creditor, perhaps it would
 have been equitable that he should assign him all the secu-
 rities against the estate of Mr. Alexander, the principal
 debtor, but there is no equity which will give to Mr. Alex-
 ander, or to his general creditors, the benefit of the respon-

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 Declared that the appellants not having pursued the appeal against the interlocutors of 18th July 1780 on the 19th June 1782, the day appointed for hearing the said appeal, and the said interlocutor having been thereupon affirmed, and thereby become absolute and final, the appellants are precluded from the ground of objection now insisted on by them. And it is therefore ordered and adjudged that the interlocutors be affirmed.
 For Appellants, *A. Pigott, Alex. Wight.*
 For Respondent, *Ilay Campbell, Wm. Alexander.*

[Mor. 4525.]

REBECCA DELVALLE, FRANCIS ROPER HEAD, Esq. and Others, Creditors of the Governor and Company for Raising the Thames Water in York Buildings, } *Appellants ;*
THE GOVERNOR & COMPANY of Undertakers for Raising the Thames Water in York Buildings, } *Respondents.*

House of Lords, 12th March 1788.

PRESCRIPTION—FOREIGN.—Circumstances in which held, that certain bonds due to creditors in England, by an English Company, ranked on an estate in Scotland belonging to *that Company*, had incurred the negative prescription of forty years. Reversed in House of Lords.

The appellants, creditors of the York Buildings Company, were those class of creditors called the annuity creditors, the company having been empowered by act of Parliament to raise money on their estates by granting bonds of annuity.

The following is a copy of one of the bonds:—

“ 13. No. 77. £100.

“ The Governor and Company of Undertakers for raising
 “ the Thames Water in York Buildings do hereby oblige
 “ themselves and their successors to pay unto Mr. Thomas
 “ Yorbury, his executors, administrators, or assigns, £100,
 “ with interest at the rate of £4 per cent. per an., on the
 “ 12 day of April 1732; for true payment whereof they

“bind themselves and their successors in the penal sum of 1788.
“£200. London, 12 Dec. 1724.

“By order of the Court of Assistants,
(Signed) HUMPHREY BISHOP, Cashier.”

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In the long course of procedure and litigation which attended the winding up of the company, the bond in question had incurred the negative prescription; and the company finding that there would be a surplus left to divide among the partners of the company after satisfying all just claims, objected to the appellants' bonds. 1. That they were cut off by the negative prescription of the law of England, no step having been taken by the creditors on such bonds within twenty years. 2. That such of the creditors as had used no steps of diligence against the company or their estates in Scotland, for the space of forty years, were now excluded by the negative prescription of the law of Scotland. 3. That the creditors holding these bonds, which were conceived in the English form, could not attach the property of their debtors for more than the penal sum, whatever amount of interest might be due on them.

It was answered, that by various proceedings had in regard to the company before its bankruptcy, these bonds had been recognised as subsisting debts, and that this had been done long within the twenty years prescription of the law of England, assuming the *lex contractus* and the law of the domicile of the company to prevail.

Upon the report of Lord Monboddo, the Lords found as follows:—“Repel the objections stated to the bonds claim- Feb. 5, 1783.
“ed in the ranking, arising from the taciturnity of twenty
“years, in respect, from the special circumstances of the
“case, there is no room for the presumption of the said
“bonds having been paid by the said company: sustain the
“second objection, to such of the said bonds as have lain
“over for forty years without any diligence done, or action
“raised thereon: that the same are not entitled to a place
“in this ranking, in respect that they are cut off by the ne-
“gative prescription of the law of Scotland,” &c. On re-
claiming petition against the finding as to the negative pre-
scription of the law of Scotland the Court adhered. The
Court afterwards pronounced two interlocutors on points of
form, of these dates.

July 31, 1783.
Mar. 11, 1786.
Mar. 8, 1787.

Against these interlocutors the creditors brought the pre-
sent appeal.

Pleaded for the Appellants.—1. The books of the York Buildings Company, and the proceedings in the House of

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Commons and in the Court of Chancery, afford the most complete conviction that the bonds on which the appellants claim to be ranked are still due and owing, and that payment of no part has been received. 2. The objection, besides, will appear most unfavourable, when it is considered that, till the sale of the remainder of the company's estates was made, under the authority of the act 17 of His Majesty, the appellants, who, or their predecessors, had, through absence, minority, or other such causes, neglected to enter their claims, had no prospect of receiving payment of their debts. Till then, it was generally supposed that the company's estates in Scotland would be exhausted by the claims of *real* creditors. In England the company was possessed of no estate whatever, and insuperable bars lay in the way of bringing a suit, so as to obtain judgment against them. 3. Although the negative prescription of the law of Scotland may, with great propriety, be resorted to to cut down bonds or contracts entered into in Scotland, it cannot in justice be applied to the bonds now in question. The proper *forum* of the York Buildings Company was and is in England, the residence of the company, and the seat of their trade being there. They were created into a corporation, first by an *English* patent, and afterwards by an *English* statute; their general court was always held in London, and no where else. The great bulk of the partners were Englishmen, and the proceedings in the winding up show that their affairs have been in the Court of Chancery, subject to the orders of that court. In short, to all intents and purposes, they are an English company. The bonds in question were issued by the company in the English form; they bear date in London. They are not conceived in a form which could have been sustained by the common law of Scotland, had they been issued there. The appellants also are Englishmen, and have their residence in England. And although, in order to recover payment of their just debts out of their debtor's estate in Scotland, it behoves them to resort to the courts of law in Scotland, the municipal laws of that country cannot be set up as a bar to their suing upon obligations which are still *good grounds of debt in England*. There is no statute of limitation in *England* similar to the negative prescription in Scotland in the case of bonds; and in regard to the twenty years prescription, it is clear that it does not apply to the case—no presumption of payment being possible in the circumstances of the procedure had in this case, where these bonds were acknowledged as still due.

And it is no answer to say, that although the appellants' bonds may still be good in England, yet the judges in Scotland ought not to sustain action upon them in opposition to their own law, which holds the debt extinguished in forty years, because it would be wrong to apply the statutes relative to the negative prescription in Scotland to foreign transactions or contracts, executed in a foreign country, and where both debtor and creditor have their domicile. These statutes can have no authority *extra territorium*.

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Counsel having been called to be heard in this cause; and no counsel appearing for the respondents, the appellants' counsel were heard to state and argue the case (as above), and being withdrawn, it was

Ordered that the interlocutors complained of be reversed, in so far as they sustain the objections to the bonds claimed by the appellants, that the same are not entitled to a place in the ranking, in respect they are cut off by the negative prescription of the law of Scotland.

N. B.—*No Respondents' case delivered.*

For Appellants, *Ilay Campbell, John Scott, Alex. Wight.*

MISS JANE WHITEFOORD, only surviving }
 Child of the deceased Bryce Whitefoord, } *Appellant;*
 JAMES WHITEFOORD, Esq. - - - *Respondent.*

House of Lords, 15th March 1788.

SUCCESSION—FIAR—INFETMENT—DISPENSATION CLAUSE—PRESCRIPTION.—A father conveyed his estates to his heir male, whom failing to his eldest daughter. The heir male, after the death of the father, succeeded, but died without issue; having, previous to his death, conveyed the estates to a remote relation of the same name: Held, that as fiar, he was entitled so to convey the estates, notwithstanding the destination over in favour of the daughter. Objection to sasine, that the dispensation clause, granted by the Crown, making infetment on one part of the lands good for the whole was inept, these lands being held of different superiors. Objection repelled, prescription having run upon the title. Affirmed in the House of Lords, without prejudice to any challenge appearing on the face of the sasine of the lands of Kirkbryde; said reservation being of consent of parties.

Bryce Whitefoord, then in possession of the lands of Dunduff, Cloncaird, and others holding of the prince; and the lands of Kirkland of Maybole, called Kirkbryde, holden of the crown, obtained a charter erecting the whole into a ba-

1788. rony, to be called the barony of Whitefoord, whereof the
 _____ manor place of *Cloncaird*, thereafter called the mansion house
 WHITEFOORD of Whitefoord, was declared to be the principal messuage;
 v. WHITEFOORD. and the charter contained a clause declaring that one sasine
 to be taken on any part of the said lands was to be sufficient
 for all the lands contained in the charter, whether holding
 of the crown or prince, and infestment followed on this
 charter in that form.

Bryce Whitefoord thereafter married, and entered into a postnuptial contract of marriage with his wife, by which he disposed the whole lands then belonging to him, or that might afterwards accrue, to the heirs male of the marriage; whom failing, to the heirs male of any other marriage; whom failing, to such other person as he might afterwards name in a writing: which writing he executed two days afterwards by a deed of nomination bearing reference to that deed, and disposing these estates, failing *heirs male*, to his eldest daughter, the appellant.

On the death of her father, the appellant's brother, James Whitefoord succeeded, but died some years after succeeding, without issue. Before his death, he conveyed the whole lands and estate to the respondent, who was distantly related, and totally disinherited the appellant, without any apparent cause.

Conceiving that she had a right to succeed to her father's estates, in virtue of the postnuptial contract and deed of nomination on failure of heirs male, she brought a reduction, in which two points were made:—1. That he had no power gratuitously to alter the order of succession so settled by her father's deeds; and, 2. That his sasine in the lands of Kirkland of Maybole or Kirkbryde, holden of the king, with infestments taken at the manor place of Whitefoord, formerly called *Cloncaird*, which latter lands were held of a different superior (the prince) was null, because the crown could not give a dispensation for taking an infestment upon lands belonging to a different superior, but only as to lands held under the crown. In defence, it was stated that the appellant was only to succeed “in case I should have no heirs male procreated of my body of this present marriage;” but as that event never happened, and as there were heirs male of the marriage who *succeeded*, the appellant's claim was untenable. Besides, having made up titles, not on the contract, but otherwise, as nearest and lawful heir to his father, and possessed for 40 years, she is barred by prescription.

The Lord Ordinary sustained the defences, “repels the reasons of reduction, assoilzies and decerns.” And, on reclaiming petition, the Court adhered.

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v.

Against these interlocutors the present appeal was brought to the House of Lords.

WHITEFOORD.

July 7, 1786.

June 23, 1786.

Pleaded for the Appellant.—1. The plea of prescription does not apply, because the deeds under which the appellant rests her claim were never registered, but kept concealed in the private repositories of the brother, so that the act 1617 does not apply, because neither acquiescence nor negligence, which is the principle of that act, could be presumed against her. At all events, it can only apply to the barony of Dunduff. 2. The contract of marriage and deed of nomination, which followed two days thereafter, must be read as *partes ejusdem negotii*, executed by the same parties, and constituting one settlement, by which it was manifest that after the existence and subsequent failure of heirs male of the marriage of her father's body, the appellant, his eldest daughter, was to succeed. This his intention was evidenced by reserving a faculty in the postnuptial contract to name other heirs, failing the heirs male of his body, and by his exercising this reserved faculty in the execution of the deed of nomination, disposing his estate to the appellant. This intention being thus apparent, the deed ought to receive a construction favourable to the appellant from parental affection, and especially in doubtful words, the rule “*semper in dubiis benigniora præferenda sunt*,” ought to hold. And no prescription applies to bar the present challenge, especially in reference to the lands of Kirkbryde. At all events, it is clear that her brother's deed, disinheriting her, could not make an effectual conveyance unless he had first vested in him a feudal right to these lands. He had not such complete feudal right as to the lands of Kirkbryde holden of the crown, no sasine having been taken on these lands, but only at the manor place of Cloncaird, which are lands held of a different superior, and therefore she had a right to succeed to these. Nor is it an answer to this to say, that the dispensation in the crown charter 1702, whereby it is declared that the infeftment taken upon any part of the lands should be sufficient for the whole, because the crown, although entitled to make such a dispensing power as to lands held of the king as superior, yet was not entitled to do so as to lands held *not of him* but of another.

Pleaded for the Respondent.—1. In the deeds on which the appellant founds, there is nothing but a simple destina-

1788. **WHITEFOORD v. WHITEFOORD.** tion over failing heirs male, without any prohibition against alienation or altering the order of succession. And even if the appellant's construction of that destination were perfectly undoubted, still it would stand equally clear in law, that a contract disposing to the heirs male of the marriage, with substitutions over calling the heirs female, on failure of the heirs male, the heir who first takes is *unlimited fiar*; and the substitutes have merely a hope of succession. Under such a destination, the restraint only lies on the father. If it is wished to be carried further, it must contain express prohibitions against alienation and altering. Besides, the destination to her was only conditional, "in case of failing of heirs male procreate of my body of the present marriage." But as there was an heir male who succeeded and possessed for 60 years, the right was in him as an absolute fee, with no obligation to prevent him executing a deed such as would effectually disappoint the substitutes so named by his father, which right has been fortified therefore by prescription. 2. In regard to the lands of Kirkbryde, the objection is extremely frivolous. No doubt seisin, according to feudal principles, must be taken by symbolical delivery upon every discontinuous tenement. But here the lands were united into a barony, with a dispensing clause declaring that sasine taken on any part would be sufficient for the whole; and it is no answer to this to say, that the crown had no right to confer a dispensing power as to lands over which it held no right of superiority, as for example, as to lands held of a subject superior, or of the prince, because the king is head superior of all lands in Scotland, and to grant such rights of dispensation is a part of the prerogative of the crown which he does as to bishops lands, and is equally competent to do as to principality lands. The infestment as taken, therefore, was perfectly regular, and in conformity with the charter.

After hearing counsel, it was

Ordered and adjudged that the interlocutor be affirmed, without prejudice to any challenge arising on the face of the instrument of sasine of the lands of Kirkbryde of the 13th May 1726, the said reservation being made with consent of the respondent.

For the Appellant, *John Scott, Jas. Boswell.*

For the Respondent, *Ilay Campbell, Geo. Ferguson.*

NOTE.—Unreported in Court of Session.

DAVID DONALD of Conbeath,	-	<i>Appellant ;</i>	1788.
ANNE KIRKALDY, Widow of JAMES DONALD,	{	<i>Respondent.</i>	DONALD v. KIRKALDY.
Druggist in Edinburgh, deceased,			

House of Lords, 8th April 1788.

PROVING THE TENOR—SPECIAL CASUS AMISSIONIS, WHEN NECESSARY.
—ANTENUPTIAL CONTRACT OF MARRIAGE.—Whether the parties
can agree to retire and discharge it after marriage?

The respondent's husband died without issue, possessed of heritable estates worth £2000, and moveable estate amounting to £5000, to which the appellant, her husband's brother, succeeded, as heir and next of kin to him, subject to whatever provisions, legal or conventional, she might be entitled to. By law she was entitled to the liferent of one-third of the heritable estate as her terce, and to one-third of the moveable estate as *jus relictæ*. But the appellant alleged, and the respondent admitted, that an antenuptial contract had been executed between the parties, settling a jointure on her of £50 per annum; and although it had now disappeared from the deceased's repositories, and was lost, there were strong grounds that it was either concealed by the respondent, or destroyed by her. He first raised an exhibition against her, to recover the deed, and failing in this, he raised an action of proving the tenor, in which a proof being allowed, and the respondent examined, she admitted the execution of the deed, and that it lay in his repositories,—and that she had seen it last about eighteen months previous to her husband's death. In point of fact, the respondent deponed that the deceased, together with her father, who held *her* copy of the contract, mutually agreed, sometime before his death, to cancel and destroy both copies of the contract, which was done accordingly, that she, as his widow, might enjoy her legal rights. In point of law, therefore, it was pleaded, 1. That it was incumbent on the appellant to prove that the writing was of a certain tenor. 2. To make out a special *casus amissionis*, such as accidental fire, in order to satisfy the Court that the writing was not legally cancelled.

The Court assoilzied the defender (respondent), after July 24, 1787. considering the proof, and memorials thereon, and refused a reclaiming petition. Dec. 11, —

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Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—A contract of marriage is not a retireable instrument in the sense of law, but one of a permanent nature, the obligations arising from which cannot be cancelled or injured, after marriage has followed on the faith of it, even by the mutual consent of the arbitrating parties thereto; because the moment marriage follows, other interests arise and are settled than those of the contracting individuals. It is said, that the cancelling the contract was just a mode resorted to in effect to enlarge the provisions thereby stipulated; but this is a very unusual mode, and a mode not recognized by law. Assuming, therefore, that an antenuptial contract of marriage is not a retireable instrument, it follows, when lost, its tenor may be proved without any special *casus amissionis*; and the *onus* lies on the defender to show that the contract was lawfully discharged or cancelled. The evidence adduced to show that her husband, along with her father, had actually destroyed the contract during Mr. Donald's life, is very far from being sufficient or satisfactory. It is attended with circumstances which render the evidence suspicious, and mainly rests on the testimony of near relations.

Pleaded for the Respondents.—The office and object of a proving of the tenor, is to prevent persons rights suffering by the loss of deeds; but as this is an extraordinary remedy, the utmost strictness is required in proof, otherwise such deeds might be reared up, after they were extinguished or discharged by the parties; and, accordingly, the deed must be proved to have been destroyed in such a way as to exclude the possibility of its having been laid aside or destroyed, as retired or discharged. The contract in question being a mere personal deed, in which none but the respondent and her deceased husband were concerned, having been followed by no infestment or registration, was as much capable of being retired as any other obligation, such as a personal bond, &c., and being so capable, it required a special *casus amissionis* to be established, in order to warrant a proving of the tenor; but as no such proof has been offered, and as it has been proved that the deceased had destroyed the contract, with the view of giving to his wife more enlarged provisions, the present appeal ought to be dismissed.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed. 1788.

For Appellant, *Hay Campbell, R. Dundas, Geo. Ferguson.*

For Respondent, *J. Anstruther, Wm. Adam, Will. Honeyman.*

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[Fac. Coll. 465.]

EDWARD BRUCE, Clerk to the Signet,
WALTER ROSS, Clerk to the Signet,

Appellant ;
Respondent.

House of Lords, 14th April 1788.

WAGERS—SPONSIONES LUDICRÆ.—Whether debts incurred by wagering are good in law?—Held, that no action lay on such claims, upon the principle of *sponsiones ludicræ*.

The present question arises out of an action brought for payment of £50, being a sum gained on a wager or bet, taken on the result of an impending election for the burghs of Anstruther Easter, Anstruther Wester, Kilrenny, Crail, and Pittenweem.

The competing candidates for these burghs were John Anstruther, Esq. and Colonel Moncrief; and while the canvass was going on, the election of a knight of the shire of the county of Fife came on at Cupar, where the appellant attended as a freeholder. The respondent, who was agent for Colonel Moncrief, was also at Cupar on that occasion, and met the appellant there. The respondent having, in the course of conversation, boasted much that his constituent, Colonel Moncrief, would prevail and carry the burghs, and having offered, in the presence of a number of freeholders of the county, to back his opinion with a bet to any extent, the appellant took him up, and wagered £50 that Mr. Anstruther would gain the election—the respondent on his part wagering £50 that he would not, but that Colonel Moncrief would ultimately be the sitting member.

The election for these burghs, when it came on, terminated in Mr. Anstruther being returned member to sit in Parliament.

It appeared that the respondent knew, from calculations made, that Mr. Anstruther would gain his election, but his

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hopes lay in being able to overturn this election in favour of Colonel Moncrief by objections to the validity of the voting. A petition was accordingly presented to the House of Commons to set aside the election, on the ground that Mr. Anstruther was unduly elected, but this petition was withdrawn a few days before a Committee was to have been appointed to try the merits of the election.

The respondent having refused to pay the £50, action was raised for payment thereof, to the competency of which, in the course of the proceedings below, no objection was stated by the respondent.

Feb. 28, 1786. Of this date, the Lord Ordinary pronounced this interlocutor :—" In respect it is admitted that at the date of the
" wager in question the delegates for the eastern district of
" the Fife burghs were chosen, and a majority of them were
" known to have declared for Mr. Anstruther; finds that the
" object of the wager could only have related to the discus-
" sion of a petition to be presented to the House of Com-
" mons, complaining of an undue return; and as it is not
" denied that the petition was afterwards withdrawn, in
" consequence of a private agreement amongst the parties;
" therefore, upon this ground in particular, and taking the
" whole circumstances of the case together, sustains the de-
" fences, assoilzies, and decerns." Upon a representation

Mar. 10, 1786. the Lord Ordinary, of this date, allowed a proof, which having been taken and reported, and informations ordered upon its import, the Lord Ordinary reported the whole cause to the Court.*

Jan. 26, 1787. The Lords pronounced this interlocutor :—" Find that action does not lie in this case; therefore dismiss this ac-
" tion, assoilzie the defender therefrom, and decern."

Against this the appellant preferred a reclaiming petition, but the Lords " refused the desire of the petition, and ad-

Feb. 14, 1787. " hered to their former interlocutor."

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—1. No objection was made to the competency of the action by the respondent in the proceedings below. 2. Every contract or agreement that is not unlawful, as being *contra bonos mores*, or as attended with public detriment, is binding and obligatory, and must

* The proof seemed to bear on the fact of the bet having been upon the issue of a petition against Mr. Anstruther's return.

therefore afford a ground of action. And although excessive wagering may sometimes be attended with hurtful consequences to the losing party, the law of no country either has arrived, or ever will arrive, at that degree of perfection, as effectually to curb and restrain all the vices, and still less all the follies to which mankind are liable. Unless therefore it can be shown that betting or wagering upon future consequences, is in itself an act of so immoral a nature as to be unfit to be made the ground of an action in a court of law, or is prohibited by some particular statute, the appellant humbly apprehends, that such wagers are equally binding and obligatory as any other contract or agreement whatever. But where the immorality lies in two persons staking their money upon an uncertain event, or where the statute is that prohibits them from doing so, the appellant has not hitherto been able to discover. Gaming with cards or dice for money, is, at least, as hurtful in its consequences, and indeed much more so, because liable to frequent repetition, as laying bets and wagers on uncertain events is what will not readily be disputed ; but that this kind of gaming was not prohibited by the common law of Scotland, is perfectly clear from this, that the Legislature found it necessary to restrain it to a certain extent by a special statute 1621, cap. 14. By that act it was statuted and ordained :—“ That no man shall play
“ at cards or dice in any common house, town, hostelrie, or
“ cook’s houses, under the pain of forty pounds of the
“ realm, to be exacted of the keeper of the said inns, or com-
“ mon houses, for the first fault, and loss of all their liberties
“ for the next : Moreover, That it shall not be lawful to play
“ in any other private man’s house, but where the master of
“ the family playeth himself : And if it shall happen any
“ man to winne any sums of money at carding or dicing, at-
“ tour the sum of an hundred merks, within the space of
“ twenty-four hours, or to gain at wagers upon horse races,
“ any sum attour the said sum of an hundreth merks, the
“ surplus shall be consigned, within twenty-four hours there-
“ after, in the hands of the treasurer of the kirk, if it be at
“ Edinburgh ; or in the hands of such of the kirk-session in
“ the country parishes as collects and distributes money for
“ the poor of the same, to be employed always upon the poor
“ of the parish where such winning shall happen to fall out.”

But although by this statute, playing at cards or dice, and even wagers upon horse races are restrained *sub modo*, yet it does in no degree affect wagers upon future contingencies,

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whether confined to a smaller or to a larger sum. And that such wagers were considered to be lawful, and of course to afford a good ground of action by the law of Scotland, is evident from Sir George Mackenzie's observations on this very act of Parliament. His words are, " By the civil law, tit. 43, lib. 3, l. 1.—Cod. de aleatoribus, He that is overcome at such games is not obliged to pay; and although he pay, he or his heirs have repetition. And by the canon law, churchmen who use such games cannot be provided to benefices, cap. 11, De Excess. Prelat. But yet wagering *seu sponsio*, was by that law allowed, L. 17, § ult. ff. de Præscript. Verb. And as our horse races were not condemned by that law, though they were by ours; for that law did think that nullam turpitudinem continet in se, sponsio nam inde rixæ oriri non solent. But our law did condemn horse races, because they occasioned great idleness and expense. This act is still exactly observed, but is not extended to other wagers; such as that ships will arrive at such a day or in such a place, which was not found to fall under this act, which speaks only of cards, dice, and horse races. It seems that this act would not be extended to any other game *ex paritate rationis*." The same author indeed adds, that though wagering was allowed by the civil law, yet if any of the parties certainly knew the thing, whereupon he wagered, but concealed his knowledge, action would not lie upon such wager; and that the courts in Scotland had most justly decided accordingly. But this only serves to strengthen the general rule, that wagers with respect to future contingencies, of which both parties are equally uncertain, are unlawful. And the same observation applies to the last observation which this author makes in the following words: " Wagers likewise upon the death of princes are discharged, as giving occasion of jealousy: as also wagers concerning the event of public undertaking for the good of the country, such as the success of arms, &c. and that lest men should be tempted either to wish the armies of their native country not to prosper, or to reveal their secrets to the end they may not prosper. Vid. zipeum in Not. Juris Belli, lib. 3, in fin. There is such an act as ours, made by Lewis XIII. of France amongst his statutes, cap. 138, at seq. "

That such wagers, though they have seldom been made the subject of law suits, have been sustained in the Court of Session as good grounds of action, appears also from a decision, which is thus reported by Dirleton, 9th February

1676 : “ A pursuit was intended for a sum of money, which
 “ the defender was obliged, by his promise, to pay, in case
 “ he should be married, having gotten from the pursuer, in
 “ the meantime, a piece, which the pursuer was to lose, in
 “ case the defender should not be married. The Lords sus-
 “ tained the pursuit, though some of their number were
 “ of opinion that *sponsiones ludicræ*, of the nature foresaid,
 “ ought not to be allowed.” 2. The Court of Session seemed
 to have been misled, by supposing that the wager was laid
 upon the issue of a petition to be preferred to the House of
 Commons, and by considering it to be improper and inde-
 cent to bet upon any thing of the kind ; but, although Mr.
 M’Millan, in his deposition, makes use of the words “ ulti-
 “ mately found to be the sitting member ;” it is not thence
 to be inferred, that the question was necessarily to undergo
 a judicial decision, either in the House of Commons or else-
 where. In common language, it is not unusual to say, that a
 person is to be found so and so, because he is to be so and
 so. The bet between the parties depended on a point of
 fact, then uncertain, viz. Whether Colonel Moncrief or Mr.
 Anstruther would be the sitting member for a particular
 district of burghs ? and to the determination of that bet, it
 was of no earthly consequence whether a petition should be
 presented to the House of Commons or not ; or, whether
 such petition, after being presented, should be prosecuted
 or withdrawn. The respondent was indeed at pains to prove
 that Colonel Moncrief was started as a candidate when ab-
 sent from this country, and without his knowing any thing
 of the matter. The respondent must therefore admit, that
 at the time when he laid the wager, he could not possibly
 know, whether Colonel Moncrief would or would not com-
 plain of Mr. Anstruther’s return. But, even supposing the
 respondent, from his particular situation, to have known that
 a petition would, in all events, be presented, either in the
 name of Colonel Moncrief, or in the names of individual
 voters in that interest, still the wager did not depend upon
 the issue of such petition. Colonel Moncrief might die in
 the interim, before it could be taken into consideration, or
 it might be withdrawn, as in fact it was, without being
 brought to bearing. In either of which cases, the respon-
 dent must have lost his bet.

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Pleaded for the Respondent. — 1. The ground upon
 which the appellant applied to the Lord Ordinary, com-
 plaining of his Lordship’s interlocutor of the 26th February

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1786, was, that his Lordship had mistaken the fact of the wager. He admitted the justice of his Lordship's conclusion, and only disputed the fact upon which it proceeded; the evidence shows that the fact was as stated in the interlocutor. It is, besides, proved by the appellant's own witnesses, that the terms of the wager offered by the respondent, and taken up by the appellant, were, that Colonel Moncrief should be *ultimately found* to be the *sitting member* in the present Parliament. It was at that time certain that Mr. Anstruther must be *returned*; and, it is equally certain, Colonel Moncrief never could be found to be member by any power or judicature but the House of Commons, or by any other means than the merits of a petition against the election of his opponent being tried in a Committee of that House. Upon this single event, the respondent, to use the appellant's expression, *totally relied*. And, as the petition presented to the House of Commons was afterwards withdrawn, by compromise and agreement between the parties, it became impossible to determine who was right, the appellant or respondent, in their judgment of what the event would be. It therefore follows, that neither party could win. 2. The appellant engaged to prove, that the precise terms of the wager were, that Mr. John Anstruther should not be the sitting representative, that is to say, that the wager was a mere negative on the respondent's part. On the contrary, it is shown by the proof, that the wager was positive upon a single merit, namely, the decision on the merits of Colonel Moncrief's petition to the House of Commons, against the return of Mr. Anstruther.

In regard to the two last interlocutors appealed from, they were pronounced as the *unanimous judgment* of the whole Court; their Lordships being decidedly of opinion, that, by the law of Scotland, no action was competent in cases of this kind. The rule and principle of the civil law, relative to *sponsiones ludicræ*, were early adopted as common law in that kingdom, and have been constantly adhered to. Thus, in the case of Sir Michael Stewart against the Earl of Dundonald, 7th February 1753, William Cochrane having, at a time when three persons were living, who preceded him in the succession to the Earldom of Dundonald, granted bond to John Stewart, on the recital of a certain sum advanced, and obliged himself to pay 100 guineas as soon as he or his heir should succeed to the said Earldom, and having, in point of fact, afterwards succeeded, the Court

set aside the bond as void and null, on the ground of its being an unlawful contract or wager. 1789.

After hearing counsel, it was
Ordered and adjudged that the interlocutors of the Court below be affirmed.

SINCLAIR, &c.
v.
THREIPLAND,
&c.

For Appellant, *Geo. Ferguson, W. Adam.*
For Respondent, *Ilay Campbell, R. Dundas.*

HENRIETTA SINCLAIR, (Wife of WILLIAM WEMYSS SINCLAIR, Esq.), and JANET WILLIAMSON, formerly SINCLAIR, (Wife of BENJAMIN WILLIAMSON, Esq.), the Daughters and only Children of JAMES SINCLAIR, Esq., by his Wife MARJORY, deceased, who was the Eldest Daughter of DAVID SINCLAIR, Esq., late of Southdun, deceased, by MARJORY his second Wife; the said WILLIAM WEMYSS SINCLAIR and the said BENJAMIN WILLIAMSON, for their interests; and JAMES SINCLAIR of Durren, Esq. Trustee, constituted by Mrs. KATHERINE SINCLAIR, now deceased, who was the Second and only other Child by his Second Wife,

Appellants;

STEWART THREIPLAND of Fingask, Esq. the Father and Executor of DAVID SINCLAIR THREIPLAND, deceased, and PATRICK THREIPLAND, Esq., Brother of the half-blood, and Heir-at-Law of the said DAVID SINCLAIR THREIPLAND,

Respondents.

House of Lords, 27th March 1789.

MARRIAGE SETTLEMENT—RELIEF AMONG HEIRS—RES JUDICATA.—

The questions in this case were, 1st, Whether a deed executed by David Sinclair of Southdun in 1716 was to be considered a marriage settlement? 2. Whether it was competent to enter into that question, in respect of it being *res judicata*, by a decree pronounced between the same parties in 1763? 3. Whether the heir in possession, who is bound to keep down the interest of the debt due on the estate, during his possession, has relief against the other heirs of line taking separate estates? The Court of Ses-

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sion waived the first point, and held the *res judicata* to foreclose. Found, in the House of Lords, that the decree 1763 being in reference to a different subject matter, did not exclude, and case remitted for further consideration.

David Sinclair of Southdun was thrice married. With his first wife he had issue one daughter, who married the respondent, Stewart Threipland. Of this marriage there was issue a son, David Sinclair Threipland, and a daughter Janet. They survived their grandfather, but died without leaving issue.

With his second wife, David Sinclair of Southdun had two daughters, Marjory and Katherine Sinclairs. Marjory married James Sinclair, and died leaving two daughters, Henrietta and Janet Sinclairs, the appellants; and Katherine died without issue, having vested her effects in the appellant, Mr. Sinclair of Durren, as trustee.

With his third wife he had a daughter, Margaret, who survived him, but died without issue.

David Sinclair of Southdun, two years after his marriage with his first wife, executed a deed, conveying the estate of Southdun to his wife in liferent, and to his heirs male; whom failing, to Janet Sinclair his only daughter, whom also failing, the nearest heirs female procreate of his body in fee.

With his second wife a formal antenuptial contract was entered into, whereby all the real and personal estate which should be conquest (acquired) by him, during the subsistence of that marriage, was disposed, "The one half to his wife in liferent, and the whole to the children of the marriage in fee," declaring that nothing was to be reputed conquest, but what the said David Sinclair shall be worth at his death, beyond his present land estate, and after payment of all his just and lawful debts contracted during the marriage.

In 1747, Mr. Sinclair of Southdun made an entail, comprehending not only Southdun and others comprised in the deed 1716, but also other lands after acquired, to David Sinclair in liferent, and to the heirs male lawfully procreated of his body.

After his marriage with his third wife, he executed a post-nuptial contract of marriage; in order to fulfil the terms agreed between them before the marriage, whereby he "bound and obliged him and his foresaids to infest and seize his said wife, for her liferent provision, in all and whole the town and lands of Stanhill," and others therein mentioned, of

which a considerable part were comprised in the deed 1716. 1789.

He left her also £1000 Scots to build a house on the lands.

Southdun died in March 1760, leaving his third wife to survive him.

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David Threipland, the only son of the daughter of his first marriage, was entitled, under the entail 1747, to succeed to the lands thereby conveyed. Mrs. Marjory and Katherine Sinclairs, the children of the second marriage, were entitled to the conquest of that marriage; and were, besides, heirs portioners of line to the real estate not otherwise destined, and belonging to him at his death.

Soon after David Sinclair of Southdun's death, action of reduction was raised by David and Janet Threipland of the first marriage, to set aside the deed of entail of 1747, on the ground that Southdun had not power to alter the order of succession established by the deed 1716, or to lay the heirs thereby called under the fetters of an entail. In this action the Court of Session "Sustained the reasons of reduction of the entail, in so far as concerned the lands of Southdun and others contained in the deed or obligation granted by the deceased David Sinclair of Southdun, 1716; but repelled the reasons of reduction in so far as concerned the remaining lands contained in the said entail." Nov. 19, 1763.

By the death, both of David Threipland in 1773, and Janet his sister, the issue of the first marriage became extinct, leaving the succession of the entailed estate open to Mrs. Katherine Sinclair, the surviving daughter of the second marriage; and the lands comprised in the deed 1716 descended to the said Katherine, her sister Margaret, and the appellants, Henrietta and Janet Sinclair, her nieces, in the character of heirs of provision to Mr. Threipland, by the limitations of that deed.

Soon after David Threipland's death, the estates became the subject of a ranking and sale, and were sold.

The respondent Dr. Threipland, before his son's death, (David Sinclair Threipland), in 1773 had, in order to relieve the estates of certain debts pressing upon it, made several large advances to Southdun's creditors, taking conveyances of the debts in Mr. Farquharson's name as his trustee, amounting to £3000, part of which consisted of money paid to the widow of Southdun, by the third marriage, both as jointure, and £1000 Scots to build the house. Action being raised by the respondent for these sums, it was conjoined

1789. with the ranking; and the Lord Ordinary found the respondent entitled to be "ranked for the sums libelled, and
 ——— SINCLAIR, &c. " interest thereof that were paid by him, with annual rent of
 v. " the accumulated sums, consisting of said principals and
 THREIPLAND, " interest, from the different periods at which the same
 &c. " were paid respectively, in the process of ranking at the in-
 " stance of the respondents, as heirs of line of the deceased
 " Southdun."

The following question then occurred. It was objected by the appellants that Mr. Threipland, while in possession of the entailed estates, was bound to contribute along with the other heirs towards relief of the interest of that debt incurred during the possession of that estate, after application of all the funds primarily liable to discharge the same. And therefore that Dr. Threipland's claim could not be sustained.

Dec. 13, 1786. The Court, on report of the Lord Ordinary, pronounced this interlocutor: "Find that the rents of Southdun's entailed estate of Brabsterdonan and others, during the
 " deceased David Sinclair Threipland's possession, stood
 " chargeable with the payment of the interest arising due
 " during that time upon that part of Southdun, the entail-
 " er's debts, which exceeded the proceeds of his unentailed
 " estates, descendible to his executors and heirs of line.
 " But find that in so far as the jointure and other provisions
 " settled upon Southdun's widow, and paid to her by the
 " said David Sinclair Threipland, or uplifted by her out of
 " the lands of Southdun's first marriage settlement 1716,
 " were not satisfied or repaid to him by any surplus of the
 " rents of the said estate during his possession, remaining
 " after deducting the interest above mentioned, the pursuers
 " (respondents) as in right of the said David Sinclair Threip-
 " land, are entitled to relief of the said jointure, to be accu-
 " mulated yearly, at the first term of Whitsunday or Martin-
 " mas after the payments thereof were made to the widow,
 " with the interest of such accumulated sums from and since
 " the terms of accumulation thereof; and are also entitled
 " to relief of the sum of £1000 Scots paid to the widow for
 " providing a jointure house, with interest thereof since the
 " date of payment, and that the appellants are liable to the
 " respondent in such relief, as now representing Southdun."

Two reclaiming petitions were presented to the Court by
 Feb. 24, 1787. the appellants, but the Court refused the desire thereof, and
 Mar. 7, — adhered to the above judgment.

Against these interlocutors the appellants brought an appeal to the House of Lords against that part of the judgment which sustained the respondents' claim, in so far as the jointure to the widow and sum for building the house were concerned.

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Pleaded for the Appellants.—The first question is, Whether by the deed which David Sinclair of Southdun executed in 1716, binding himself to infest his third wife in life, and the issue of the marriage between them in fee, in the lands therein described, a *jus crediti* was vested in the issue entitling them to obtain relief against the effects of onerous deeds granted by him affecting the lands specified in that deed, out of any separate estate or fund he left at his death? It is not disputed that where an estate is settled upon the issue of a marriage by a regular antenuptial contract, the husband is restrained from burdening gratuitously the estate settled by that deed, and that the issue must be indemnified against his onerous debts and deeds out of any separate estate he leaves. But the fallacy in this case lies in arguing upon the deed 1716 as a contract of marriage, or as a deed having such legal consequences. The deed is not an antenuptial contract of marriage, nor even a postnuptial contract. It is a unilateral deed, signed and executed by Sinclair of Southdun alone, and bears to proceed upon love, favour, and affection he has towards his wife. Husband and wife do not here join to convey to each other their respective estates. The deed had in view to provide his wife with a jointure, and to make a destination to his children alterable at pleasure. The children therefore, by this deed, were not constituted creditors, but had a bare hope of succession. And therefore when David Sinclair burdened the lands in that deed with the third wife's jointure, he exercised a right reserved to himself, and the children taking the lands must hold with all the burdens he thought proper to lay upon them.

No doubt it is stated by the respondent that the deed 1716 has the operation of a marriage contract in restraining the grantor from burdening to the prejudice of the issue, in consequence of the decision in the former case in 1763, to set aside the entail. But the appellants are not bound by that decision. They were then under age, and did not appear in the action. But, in point of fact, the single object of the action was to set aside the entail 1747, as imposing restraint upon heirs who were supposed to have an unlimited fee under the deed 1716. Although Mr. Threipland

1789. succeeded in persuading a majority of the Court that the deed 1716 resembled a marriage contract, and as such, was a bar to Mr. Sinclair of Southdun making a strict entail of the lands comprised in it, it does not follow that it ought now to be decreed a bar to his laying a burden upon those lands, from which the heirs have no title to be relieved. That former decree therefore cannot be pleaded as a *res judicata* binding the present parties, or necessarily regulating the decision of a *different right*. The parties here being different, and the subject matter different, there is no bar to the present question; and David Sinclair Threipland was not entitled to relief for any sums paid in name of jointure, &c., he being bound to keep down the interest on the debts with which the estate was burdened during the term of his possession.

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Pleaded for the Respondents.—By the marriage settlement of 1716, the estate of Southdun, and certain other lands therein, having been settled upon the heirs of the marriage between Sinclair of Southdun and his wife, and that settlement containing a clause of warrandice, by which David Sinclair became liable that the provision therein contained “should be good, valid, and sufficient to the heirs respective of the said marriage, and against all deadly;” it was not in the power of David Sinclair to defeat this settlement, in whole or in part, by any voluntary gratuitous deed. The respondents do indeed admit that he was entitled to charge the lands so settled with a suitable provision for the heirs of any subsequent marriage, and with a reasonable jointure to a second wife. But, while admitting this, the respondents maintain that the heirs of the first marriage have, by the law of Scotland in every such case, a clear and undoubted right to be relieved of the burdens so imposed out of any separate estate or funds of the deceased against his representatives succeeding to the same. Here Southdun charged the lands with a jointure of £100 a-year to his third wife as well as with £1000 Scots to build a house. In point of fact also David Sinclair of Southdun died possessed of considerable separate estate, not included in the deed 1716, to which the appellants have succeeded, and are therefore liable to relieve the respondent of the sums disbursed by David Sinclair Threipland, in paying the jointure and other sums, with interest as aforesaid.

But further, in an action to which the appellants were parties, it was solemnly decided, by a judgment in which all

parties acquiesced, that the deed 1716 was a valid and effectual marriage settlement to the effect of setting aside the entail executed by Southdun in 1747. By that decision there is a sufficient bar to the present question.

After hearing counsel,

The LORD CHANCELLOR said,

“ MY LORDS,

“ The decree in 1763, I am clearly of opinion, is not a bar to the appellants’ action, and that the deed 1716 ought not to have the effect of a marriage contract. But as the Court below had not gone fully into that question in the present cause, I thought it right to give them an opportunity of reconsidering it.”

It was therefore ordered and declared that the matter adjudged in the interlocutor of 19th November 1763 was essentially different from that brought into question in the present cause, and could not bind the subject matter of the present suit. And it is therefore ordered that the cause be remitted back to the Court of Session to hear and determine the point now put in issue without any prejudice arising from the said interlocutors.

For the Appellants, *Ilay Campbell, Geo. Wallace.*

For the Respondents, *Sir J. Scott, Alex. Abercromby,
Thos. Andrew Strange.*

ANDREW STRATION, a Pauper,	-	<i>Appellant ;</i>
THOMAS GRAHAM of Balgowan, Esq.		<i>Respondent.</i>

House of Lords, 28th March and 12th May 1789.

LEASE—DEVIATION FROM MODE OF CROPPING—PENALTY.—A tack stipulated that the tenant was at liberty to deviate from the mode of cropping and management laid down in the tack upon his paying £2. per acre more of additional rent to the landlord. He departed from the mode of cropping. Held, in the Court of Session, that he was liable to pay the £2. of additional rent. Reversed in the House of Lords, and case remitted to ascertain and determine specially what was the number of acres the tenant became bound to cultivate in the manner specified in the tack, and what was the number of acres cultivated contrary to the conditions thereof.

The present question was raised by the respondent against the appellant, his tenant, for the additional rent mentioned

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in the lease of his farm as conditioned and agreed upon to be paid on the tenant's deviation from the rule of cropping and management of the farm laid down in the lease.

The tenant alleged that, on entering into the bargain, or alleged form of a lease, nothing special was said as to any particular management and cropping of the farm, or of any penalty as a consequence of deviation from said management, but that he had signed a "form of a lease" applicable to all the tenants on the estate, with the names and sums left blank, but, though read partly over to him, the clause about the cropping and management of the farm was not read over.

The form of the tack ran thus :—" The form of a tack to
" be entered into between Thomas Graham, Esq. and the
" several persons signing agreements for leases of farms in
" the baronies of Luncarty, Pitmurthly," &c. &c. Then followed the scroll of a lease, leaving blanks for the names of the lessee and the description of the farm. The term was filled up 19 years, commencing in 1777. Many reservations were made in favour of the landlord, particularly the following : " Reserving liberty to the said Thomas Graham, at any
" time during the tack, to quarry and lead stones for building of fences, and to enclose and subdivide, with ditch and
" hedge, or stone fences, all or any part of the said fences
" on all or any part of the said lands ; as likewise to plant
" hedge row trees in the yards and along the fences already
" made, or that may be made on these lands during this
" tack, all at the said Thomas Graham and his foresaids
" their own expenses." Next followed an obligation on the tenant to pay 5 per cent. per annum for the money expended by Mr. Graham in making hedge fences, and 10 per cent. for stone fences. And then follows this clause : " And for
" the further encouragement of the said and
" for the improvement of his farm, by enclosing the same
" and clearing it of stones, the said Thomas Graham binds
" and obliges himself and his foresaids, to be at the expense
" of building into stone fences the whole stones that the said
" and his successors shall take out of the
" ground when dressing it, lead and lay down in a regular
" manner, and sufficient quantity, on the marches of the said
" farm, or on such lines of division as the proprietor, or
" whom he may appoint, may mark out as a proper subdivision of the farm into regular fields and enclosures, each
" containing about one-tenth part of the ploughable lands of
" the farm, and that without charging the tenant any inte-

“ rest on the money expended on building the said fences
 “ to which he hath bolled and led stones as aforesaid ; it
 “ being always provided and declared, that the said fences
 “ made in any of the manners as aforesaid, shall be lined
 “ out and the places thereof determined by the said Thomas
 “ Graham, or such person as he may appoint for dividing
 “ the said lands into as regular and distinct fields as the
 “ grounds will admit of, and as equally as possible to con-
 “ tain in each field about the tenth part of the ground capa-
 “ ble of tillage, and calculated as much as may be to have
 “ water in each field.”

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Covenants were then inserted as on the part of the ten-
 ant, to pay certain fixed rents, for which blanks were left,
 during the first nine years, and an additional rent blank du-
 ring the last ten years, together with the “ occasional rents
 “ hereafter reserved in the cases hereinafter particularly
 “ mentioned. And whereas there is much encouragement
 “ given for enclosing and improving of the said farm as afore-
 “ said ; and in regard to arable land, with such contiguous
 “ and best parts of the muir capable of tillage, in all a-
 “ mounting to the quantity of acres of the said lands
 “ is to be deemed ploughable and improveable arable lands,
 “ and is to be laid out and divided into ten distinct enclo-
 “ sures or brakes, each contiguous within itself, at the sight,
 “ and by the direction of the said Thomas Graham and his
 “ foresaids. Therefore the said binds and ob-
 “ liges him and his foresaids to manage the said fields and
 “ brakes in a regular and distinct thriving husband like
 “ manner, as after mentioned ; that is to say, the said
 “ binds and obliges him and his foresaids,
 “ by the end of the first five years of this tack, and there-
 “ after during the currency of the same, and at the end
 “ thereof, or his removal, to have one half of the said
 “ arable land, or five of the said brakes, consisting of half
 “ of the old infield and half of the old outfield, to be in
 “ grass, sown out with grass seeds as aftermentioned,
 “ and to have of the other five brakes or enclosures in til-
 “ lage, one of them in summer fallow, ploughed at least four
 “ times during the summer, or in a four feet wide drilled
 “ and horse-ploughed crop of turnip, cabbages, potatoes or
 “ the like green crop yearly, and the corn crop growing on
 “ the other four-fifths or brakes in tillage yearly shall be so
 “ arranged that no three white corn crops succeed one ano-
 “ ther.” Then followed the clause upon which the present
 action is raised. “ And it is hereby declared that notwith-

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The present action was then raised, several years after entering on the farm, for payment of £500 Sterling, as an alleged stipulated additional rent of 40s. for every acre not cultivated in a particular way, and for £160 as the additional rent for 80 acres, the half of the farm, for crop 1783 and for crop 1784, for not having this number of acres sown in grass, in terms of the form of tack. When the appellant entered on the farm, it was alleged that he set about improving it to the best advantage, so far *as his* judgment directed him, laid out a considerable sum on lime and marle, and managed the grounds in the most unexceptional manner, as far as their situation would admit, for all which he had to pay a rent, which he had done regularly, of 24 bolls of meal, 16 bolls beer, carriages, 16 hens, keeping one dog, together with £51 sterling yearly, for the first nine years, and £61 sterling for the last ten years. Whereas the landlord, on his part, although bound to enclose the grounds, had done nothing except in enclosing one field. The defences stated to the action were, 1st, That the writings founded on as a lease, were all void in law, as wanting the usual statutory solemnities. 2. Even if held to be valid, yet, looking at its contents, it was apparent, that those covenants relating to the management, could not be understood as applicable to every case, nor were so meant by the parties; so that the real intention was, that they should be varied according to circumstances. 3. That the additional rents claimed were in the strictest sense penal, and therefore subject to modification by the Court.

The Lord Ordinary, of this date, pronounced this interlocutor :—“ Finds, that by the form of tack, now found by the Court to have been binding upon the defender (appellant) from the commencement of his tack, no obligation is imposed upon the master to enclose the farm into ten divisions or enclosures, but that it was left to the master or tenant to make these enclosures at any time during the currency of the lease, with the burden of the tenant’s paying interest at five per cent. for ditch and hedge, and ten per cent. for stone dykes, if made by the master ; and with certain encouragements to the tenant, and repayment of the price or value by the master, at the end of the lease, if made by the tenant. And therefore finds, that the tenant cannot found upon the master’s not having completed the enclosures, as a total liberation from the whole conditions and limitations of the tack. Finds, that at the commencement of the defender’s (appellant’s) tack, the whole farm was subdivided by the master, with the knowledge and assistance of the tenant, into the ten breaks specified in the form of tack, and that these breaks were properly meithed and marked, as the proper lines of division for making the enclosures, when the master or tenant should choose to complete all or any of those enclosures, and must be held and understood as the ten breaks or divisions, according to which the tillage of the farm and laying down with grass seeds, was to be regulated according to the form of tack. Finds, that the tenant cannot plead his being ignorant of the import of his tack, previous to the interlocutor of the Court, as an excuse for transgressing the conditions of the tack. Finds, by every calculation which the Lord Ordinary can make, the amount of the additional rent which he has incurred by mislabouring the farm, and the damage sustained by the master by the defender’s having failed to have any five of the breaks, at the end of the first five years of the tack, sown down with grass seeds, and the other five breaks in tillage, according to the rotations therein prescribed, a very large sum must be due by the tenant to the master : but not being able to obtain evidence of the precise amount, without involving the parties in a delay and expense which must be hurtful to both, and ruinous to the tenant, and having considered the whole circumstances of the case from the commencement of the cause, modifies the whole sum due by the defender, upon account of additional rents for over-plough-

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“ ing, and for damages for not laying down his breaks with
 “ grass seeds, and all transgressions of his lease, preceding
 “ Martinmas last, to the sum of £200. Finds him liable to
 “ the pursuer for that sum over and above his rents, and
 “ decerns.”

Dec. 22, 1787. On representation, the Lord Ordinary adhered. On
 Jan. 31, 1788. second representation he adhered. And, on reclaiming pe-
 Feb. 20, and titution to the Court, their Lordships adhered.
 Mar. 6, 1788.

After hearing counsel for the appellant, on 28th March
 1789,

LORD CHANCELLOR THURLOW said :—

“ MY LORDS,

“ I do not mean to give a decided opinion before hearing the re-
 spondent, yet there was a probability of the House declaring the
 judgment of the Court below erroneous. It was not the words used
 in the lease, but the sense of it, which a Court ought to consider, and
 here it seemed impossible but the parties must have understood the
 additional rent (which so far exceeded the real value of the land, how-
 ever cultivated) as a penalty, whatever it might be called in the lease ;
 and it is against the principles of equity to allow any person to take from
 another, what bears no proportion to the loss he has actually suffered.
 As the consequence of sending the cause back to the Court of
 Session to take evidence of the real damages, and assess the *quan-*
tum, would involve both parties in great expense, and disputes must
 be constantly arising between them during the lease, he thought it
 might be worth the landlord's while to make the tenant an offer for
 the surrender of his lease, and the tenant would probably see it to be
 his interest to accept of it.”

His Lordship directed, with that view, the further hear-
 ing to stand over till after Easter.

On resuming consideration on 12th May 1789,

LORD CHANCELLOR THURLOW said :—

“ MY LORDS,

“ This is an appeal from a judgment of the Court of Session in Scot-
 land, and the cause of action, as it is stated by the pursuer, is this :
 That he being the landlord of a farm called Pitmurthly, among a
 great number of other estates, did, as mentioned in the case, by a
 form of tack, let this estate, and the tenant took the estate upon cer-
 tain conditions there stated. Among others here represented, it was
 intended that all the parts of the farm which were either arable at
 the time, or consisted of muir land capable of being brought into til-
 lage, and containing a certain number of acres, should be deemed and
 adjudged between the parties as a quantity of land that should be call-

ed ploughable and arable and; and being once fixed, it was further agreed between them, that that land should be divided into ten equal parts, which, in the Form of tack, are called breaks and enclosures, and that when so divided, they should undergo a certain course of tillage, which, to speak generally, I shall state thus to your Lordships: That by the end of the first five years of the tack, five of these breaks should be in grass, sown out with grass seeds, and the other five of these breaks should be laid down, one in fallow, four times ploughed, and the rest with other kinds of crop, and in the manner of occupying equally distinct; namely, That the other four-fifths or breaks should be sown in corn, under certain restrictions, that certain crops of corn should not succeed each other, but a regular succession and rotation, it provides for those four-fifths or breaks. The consequence of the whole rotation would have been that, in the course of ten years, from and after the first five years of the term, the farm would have got into a course of cultivation that would have been varied as to each particular break, at least for 15 years; and the end of the term was four years more, for the tack was for 19 years.—This general proposition I should have stated to your Lordships before; after having agreed to occupy it in that manner, there is a clause in the tack very expressive, drawn to this effect, that it shall be in the power of the tenant to change this mode of occupation at his pleasure, but wherever he acted in a different manner from that described, either in the course of tillage or quantity of manure to be put upon it, or in any other small respects in which these covenants are conceived, he should pay the landlord after the rate of 40s. an acre additional rent upon that estate. The first topic of dispute upon this case is, that they pass over every speciality (which I have not yet mentioned to your Lordships) that extends to this case, and proceed *ex confesso*. Suppose this had been the most formal instrument that could be, and the tenant had covenanted to occupy in the most distinct manner, black acre or white acre, as here described, and had, notwithstanding that distinct compact, wilfully put there in a course of tillage in direct violation of the contract, this being in the nature of the thing, the penalty was to be so modified as it is called in the Court of Session. or relieved against, as it is called here, that instead of paying the sum specified, the tenant should be obliged to pay only so much as the landlord has qualified himself to receive from a breach of covenant; which is precisely the same as if he only covenants to make that payable for breach of covenant if there was no other clause but the last, and that one specified what should be paid for a breach of those covenants of the parties; that that shall be the sum to be actually paid.—When this cause was opened to your Lordships first, I observed that this penalty was so conceived as not only to apply to the case I mentioned before, but, from a particularity of expression, which I believe also was called “to implement or perform the several articles,” whether this expression applied to every acci-

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dent and omission that could have been in every part of the stipulation whatever, that obtained between the parties; and it struck my mind as a matter of doubt whether a covenant, conceived in such a form, as being applied to some of the subjects, must be deemed a penalty, must not also be in the contemplation of the parties making it a penalty on all the other subjects? In considering, as I have done with a great deal of attention, the principle upon which the Court of Session have always gone in modifying penalties, I am perfectly clear, though the covenant is so conceived, the Court, with a perfect consistency with that principle, might have modified it so with respect to some, and not have modified it so with respect to others, which, according to their respective circumstances, ought or ought not to have been so modified. I don't conceive it will fall into any person's contemplation to say it depends upon the form of the contract, whether the thing stipulated shall be deemed a penalty, because all penalties that result from stipulation have the same essential form of contract. I suppose, therefore, as in one of the cases that might be put upon this lease, the defect particularly imputed to the tenant had been, that he had occupied that break that ought to be laid down in fallow different from what was stipulated, and that the breach assigned was, that he ought to have improved that break, by laying 30 loads of lime upon one acre, and it turned out he had laid on but 29 upon the acre *res ipsa loquitur*; for that damage assigned as arising from a different mode of occupation, is the whole damage or penalty to result as if for violating of all? It would not be common sense, in the computation of so slight a difference as a 1-30th part of the whole of the manure upon the estate. Damages cannot be said to be stipulated where they are made to apply upon the subject, fairly and logically speaking, unequal; that does by no means apply where there is a distinct express mode of cultivation.

“The breach assigned is, that the tenant, in direct violation of it, deliberately and wilfully undertakes to draw a profit from the land in that manner in which he has engaged with the landlord he would not do, upon other terms but that of paying him 40s. an acre for that land so occupied. I have therefore not the least doubt in the world upon this subject, that if the parties had done that which this contract (as I shall explain presently) pointed out was their intention to do, and as I think absolutely called upon them to do, I have no doubt the tenant would have come under a very distinct obligation to pay that sum of money. Suppose he had done so, and the pursuer had gone for the money, what must he have done by way of allegation and proof? After stating the contract in the manner he has done, he must have stated that he became bound to occupy certain portions of that land in a given manner, and in regard to certain portions of the whole he was bound so to occupy, he had in some other given manner, equally distinctly expressed, occupied it differently, whereby he came within the very terms of the contract, and was bound to pay for those

acts respectively, that sum of money the contract obliged him to pay ; —proving in that case, no answer, no argument could have been made upon it. It would have been extremely distinct and clear that he ought to have paid the sum of money.

“ In this case, if the cause of action should fail in any respect, the pursuer can have no body to thank for it but his agent, who may be a man of extraordinary ability, but he has not considered the force of language, nor the nature of the obligation that he calls a form of tack, or a minute of tack, and charges it to be a tack in point of fact. He makes it out in this manner ; not that the instrument is formal, but that being confirmed by possession or homologation, it is of force, and is become in effect obligatory, and will have the whole force of a binding contract.

“ According to my own notion, the action is in some degree, though I think not fatally, but in some degree misconceived in that respect. It was not so understood between the parties. That which is called a form of tack, is a paper to which they did apply all manner of solemnities except parties, but there are no parties to it. Notwithstanding it was executed in proper form, it was digested in proper form just as if it was a binding paper, but no parties to it. It is called a form of tack.

“ Tenants names are left in blank, farms are left in blank ; and in other respects it certainly is incapable of being of itself an instrument to convey or bind in any manner whatsoever.

“ My Lords, the clauses contained in it, applying as they do to a great variety of estates, situate in different parts of the country, ought to have suggested to the parties that took any one of these farms under the clauses, the necessity of defining them, and applying them to the subject so taken. For example, in the second page of the tack, your Lordships will find this sort of provision : “ It shall be competent for the landlord to enter for the purposes of taking mines, minerals, or any substance whatever off the farm.” It never was their intention that every species of soil should be liable to that clause, as, namely, that he should take the top of the soil to make a garden of. It ought in that respect to have been reformed, and put in a more regular form. He might also sink pits for the purpose of getting stone, and might take any part of the land for , grass for horses, and all “ this.* ”

“ I dare say some of those estates would apply to that sort of covenant, but it is clear this was not one of them, and the tenant had nothing to do with it. It was absurd to apply those clauses which were intended only for the farms of a separate nature, and for other parties, and not to this particular farm in question.

“ The next clause is still more extraordinary. The landlord is at

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* Here his Lordship read from the form of tack itself, which contained a great many other clauses besides those printed in the appeal cases.

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liberty to take any part of the farm, without limitation, and plant it, besides making roads and water courses over it, as might in their own nature cause a great extent of mischief. He may take this, and yet he is to pay a sum, provided it does not amount to above 10s. an acre for the arable, and 1s. for moor land. It happens, upon computation, the rent of the land, with the several possessions, were to be farmed at about 12s. an acre, the consequence is, if he is to take the arable part, and pays no more than 10s. he might leave the tenant under an obligation to pay three or four times the value of the estate; and that neither was in the contemplation of the landlord to expect, nor the tenant to perform, according to the several articles. It was intended the next covenant should be more regular. The next article has raised a great deal of doubt in my mind, not only how to understand it, but even to understand the material clause which we are now upon. The landlord was at liberty, as I mentioned before, to take stones from any part of this farm, to build fences and plant hedges in that part of the farm, the party only reserving the liberty to the landlord to quarry and take stones and to make hedges upon any part he thought proper. It was no more than a liberty upon his side. There is a clause, I don't know which, but it relates to the enclosures of the marches. They should be made by one of them paying half the expense, but which is to make it, or is at liberty to make it, as far as it stands upon that clause, it is difficult to decide.

“ After all these clauses about the hedges, there is one sweeping clause :—That either party shall be at liberty to execute what is demanded, demanding half the expense from the other. So far the clauses are left as relate to the hedges, and so far as relate to the payment of the half. It appears to me, it was in contemplation to build or form fences; but it does not seem to infer farther but that each party may form them at half the expense of the other. One kind of obligation runs through the whole of them; they are to be laid out at the right, under the direction of the landlord, in ten equal parts as near as may be, infield and outfield in each of the marches, and * * * of the marches * * and other conveniences of that kind. As it stands, upon this clause, it is exceedingly indistinct and doubtful whether, in point of fact, these breaks have been laid out conformable to those rules, or whether, in point of fact, they could be so; but undoubtedly, if this form of tack, which purports to be only minutes of an agreement, had been to be executed, the Court of Session would have done what the Court of Chancery here does in these cases, when there is a suit to execute, (an agreement which, by a loose minute, is agreed to be executed,) by taking up the particular subjects of the general terms, and accommodating them to the sense of those general terms, and making distinct obligatory contracts, according to those forms, showing what was meant. At the same time, I don't undertake to say how far the rest of the terms of cultivation were or were not to have been fulfilled before the enclosures

were made, and in that part of the country, how far some of the exigencies of the places mentioned in this contract, might require enclosures, as the premises were situated, for the purpose of executing it at all. But when you come to the most material point that relates to this form of tack, it runs in this form. (Your Lordships will always recollect this is a clause which, like all the rest, is supposed to be applicable in a general way to all the farms intended to be the object of that tack.) “In regard to the arable land, (which I suppose to be the land in plough, and consequently known and distinguished to be arable land,) “with such contiguous and best parts of the muir capable of tillage, in all amounting to the quantity of acres of the said lands, is to be deemed ploughable and improvable lands.”—Now, it strikes me, and I cannot get very well out of that idea, that at this moment it has not been argued in the papers below, nor has it been argued now at the bar, and I have a great hesitation and a great dislike to taking up a conceit in a cause of this nature, especially in a country where the laws are not so familiar to me, upon the reading of the papers; but upon the best construction I am able to make, it appears thus: In regard to all these farms, it was plainly in the contemplation of the parties, that they were not all to be arable. It certainly, on the otherhand, does not exclude the possibility, in regard to any particular farm, that the whole might be arable, but it was clearly never in their contemplation, that the whole of all the farms would be arable; much less would the whole of it be in the other description, contiguous moor land, capable of being turned into arable. It was agreed between the parties, as the basis of the agreement, not only that that which was actually arable, but that the contiguous moor capable of being made arable, should be ascertained between them at the time, to see what land did answer that sort of description. Now, my Lords, upon this, this sort of difficulty arises. It is exceedingly plain in point of fact, that, previous to the tenant’s entering upon the estate, no idea was entertained of ascertaining that; so that he actually entered upon the estate before it was known, adjudged, and understood between them what parts were to be arable, and yet I take it to be clear that, till that was ascertained, such a contract as this could not arise, but still so are the terms of the contract.

“I will not trouble you at present further upon that subject, but will go on to consider what the rest of the instrument signed between the parties seems to import. The second part signed, is a schedule tacked to, and joined on to the form of tack and signed by the landlord; and that schedule says, “what is contained on this and “the preceding eleven pages, is the form of a tack to be entered into “betwixt the forementioned Thomas Graham and the several tenants of the lands of Luncartie, Pitmurthly, Bridgeton, Pitcairn, “Craighal and others, on the east of the water of Almond, and a-

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“ long the Tay, as also Dalcrow, Cloag, Methven, with the Baro-
 “ nies of Williamston and Gask, lying in their respective parishes
 “ and Sheriffdom of Perth, and referred to in the several docquets
 “ after mentioned, signed by each tenant, of the respective dates pre-
 “ fixed to their subscriptions. And it is hereby declared, that the
 “ respective tenants, by subscribing these presents, which compre-
 “ hend the general articles, conditions, and regulations of manage-
 “ ment of the whole estate before mentioned, with the term of entry
 “ and endurance of the leases, and also their subscribing the respec-
 “ tive docquets hereunto annexed, which contains the several farms
 “ bargained for by each tenant, and rent payable therefor, do here-
 “ by become bound, and hereby oblige themselves and their heirs to
 “ implement and perform the several articles in the form of a tack,
 “ before engrossed and docquets thereto annexed, and to sign a for-
 “ mal tack of the respective farms allotted to each tenant in terms
 “ thereof, when required, the said Thomas Graham having also sub-
 “ scribed the same in consequence of the obligation therein contain-
 “ ed to be incumbent on his part.”

“ When you read this instrument, it seems to me to be exceed-
 ingly plain that, upon the 28th of March 1778, which was the time
 of signing it by the tenant, the intention of the parties was by no
 means that he should go directly upon the estate, and enter upon oc-
 cupation of it, without more being done ; but that these agreements,
 which they call here the general articles, conditions, and regulations
 of it, should be applied to the 2nd docquet, and when so applied,
 and reduced to the form of an instrument upon that subject, then
 and then only, for the first time, it should be binding upon the par-
 ties. However, the fact was, it was signed in March 1778. The
 rest of the docquet referred to runs in this way :—the tenant says,
 “ I do hereby, in terms of the preceding form of tack, signed by me
 “ of this date as relative hereto, agree to take a tack of the farm of
 “ Pitmurthly for nineteen years after term of Whitsunday next, as
 “ bounded on the west by a new marked road on Balinblair march,
 “ on the north by the high road leading to Perth, till it joins the
 “ north-west corner of the Fir Park ; then the south side of the said
 “ firs, Hillhead houses, &c. south side of the old fir plantation, till
 “ it joins the high road again. On the east, by a new marked road
 “ dividing it from Rogerton pendicles, excepting the kirk, manse,
 “ glebe, houses and yards at Rogerton, at the yearly rent of 24 bolls
 “ of oat meal, 16 bolls beer, 16 carriages, 16 hens, the keeping of a
 “ dog, together with £51 Sterling for the first 9 years, and £61 for
 “ the last 10 years of this tack.”—Then there comes a clause of the
 proprietor allowing £20 Sterling, towards putting the offices in re-
 pair.—If necessary to observe upon that, other difficulties might
 arise, he is to charge it upon the houses, according to *recorded agree-*
ment signed by him. It seems to me, he signed no such inventory,
 and when that comes to be liquidated between the parties, the same

doubt will arise as has arisen upon this. The sort of doubt which has arisen upon this, is on the second part, or docquet annexed by the tenant, which says he has taken a tack according to the *form*.—It expressly declares that the general regulation of the whole farm shall be looked for in the form of tack, and when the rent to be paid for that farm should be looked for in the second part of the tack, I confess, it occurred to me as a material omission, with respect to actions now pending, but not material with respect to others I shall mention presently, but material with respect to the action now pending, they did not in this instrument, to which instrument alone, an express reference is made for the rent to be paid, mention such additional rents, as would in certain cases arise upon the form of tack. And if you are not to look to the form of tack for rent, but this instrument for the additional rent; the consequence will be, in this instrument no additional rent is provided for in that instance.—I have been the less anxious upon that, because I have not any doubt in the world, if a process was raised for the purpose of making him take a tack under the inference I last mentioned, it would be arranged by the Court, and applied to the particular subject in question. I have no doubt in the world, all these provisions respecting the occupations, and all the consequences that followed in making those provisions, would have been there inserted; the doubt I entertained was, if it could be deemed to be inserted as it now stood, and more particularly show what land these covenants should be said to apply to; considering the whole, there was not in this tack, or minute, or form of tack, or any writing agreed on all hands, (though the agreement might be homologated,) any agreement to show what part of this estate shall be the subject matter of those covenants; they allude to a form of tack which imports that part of it will not be the subject of the covenants, and what is more material still, it supposes that part that is material is to be fixed in acres and numbered as the part to be applied to the subject. Upon this also I should conceive doubts, if the suit was raised to make that part of the tack implemented, and the parties considered the truth of the fact upon which they are at issue, one saying the whole of 23 acres particularly muir land, the other saying not muir land, how is it to be known, unless they will examine that fact? The truth of this is, the Lord Advocate pressed me very much with the authority of the Lord Ordinary, nobody will expect I should doubt upon the authority of that great judge, if that had been so, nobody has a greater deference to his judgment than I have; I believe him as honest, just, and learned a man as ever sat on the Bench. He observed in the end, the landlord is to pay, and the landlord is like to get little or nothing. He thought, by giving damages beyond the extent, or coming down to the time the decree was reversed, he would have put an end to the contest between the parties. I wish it had bound them, or this appeal had been cut

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off by it, but not being so, your Lordships will be obliged to determine upon what appears to be alleged, and not upon any other subject whatever. I own I should have thought the only process that could have been raised with effect, would have been to compel the tenant to take a tack, in so strict, distinct, and regular a form, that there could be no doubt in the world what the effect of those covenants were. In looking back to the text book of the law of Scotland, it is unavoidable to observe, that a case in which such additional rent must arise, must be distinct and clear; and the thing to be imputed to the tenant, must be a wilful, deliberate breach of terms he has clearly and fairly entered into. Suppose that to be the case, those difficulties will remain. In the first place, from what time shall those rents become due? I confess, myself, I thought it rather wonderful any doubt should be raised upon that, considering the terms of the clause. The terms are, the tenant shall enter upon the estate. The deed in the form of the tack, your Lordships will observe, was signed in March 1776, and calculated therefore for tenants entering upon the estate in the course of the year 1777; and then the tenant was to enter and pass into the houses and yards at Whitsunday to the pastures, and not to enter to the arable land till the corn crop should be reaped at the end of the year, and to pay the rent of £51 sterling for the first nine years, and £60 sterling for the last ten years of the tack, that was payable at Martinmas the 11th of November. The consequence would have been, when the form of tack was signed, no doubt, he must have entered upon it in 1777. Suppose he entered in 1777, the next question is, how the five years shall be computed? it is said here, after five years from entering upon this tack. I conceive it impossible to compute those five years as to the mode of computation or contracts made upon that. If he had entered at the latter end of 1777, and continued till the year 1783, the commencement of 1783 was the commencement of the 6th year that he would have entered on the estate, in that way he signs one on the 28th of March 1778. You will never say the dates of a mere form, to which this refers, can be controlling dates of the tack to be taken under it, if he entered in 1776, he would lose the first ten years, which was never the intention under the form of tack and this deed of 1776. The rent does not run in 1777, the first rent is to be paid expressly upon Midsummer 1778, the next at Martinmas 1778. That was right, his tenant was not to have the substantial occupation of the farm; and the entering upon the yards and houses, was to prepare for the occupation of the farm; it was not intended to charge him for that; but he was to pay the first rent for the first year after entering, that was, the succeeding year to the entry, the latter end of 1777. The consequence of that will be, the first rent will be due upon Midsummer 1779, instead of Midsummer 1778. Now, all those additional rents, which appear stipulated by the form

of tack, are to be paid with the main rents, or to be paid upon the same terms with the main rents. Suppose this to have been, as it ought to have been, the tenant would appear, in the beginning of 1784, not to have five of the said brakes, consisting of half of the old infield, and half of the old outfield, laid down in sown grass, five might, or three might; and, in respect to those in tillage of another kind, instead of sown grass, he would have been obliged, on Whitsunday 1779, to pay 40s. an acre. The first additional rent he was to pay at all (and he was to pay none of the additional rent till then) was after the first five years, which would have been 1784, and upon the 11th November following, another additional rent would be due.

“ In this process, before the 11th November 1784, it seems abundantly clear, no breaches as to tillage could be assigned discoverable by this process, but those between the 1st of January 1784, and before the 11th November 1784, and these were breaches as to the regular payments of the rent, and what is still worse in this cause, these parties have published five hundred and odd sheets of the judgment, and in a variety of allegations, there does not appear one allegation of the quantity of land that ought to be put under this routine of tillage, neither alleging the whole farm nor any particular quantity to be put in tillage. The process only alleges he was in the practice of neglecting all his agreements, therefore, concludes he ought to pay a certain sum of money. The value of the houses erected upon it is a thing upon which they have never yet agreed. It appears to me, if we are now desired to do that which the Court below never thought of doing, down to the time of the decree, and long after it was made, there are no such materials pointed out to me, upon which it would be possible for your Lordships to say what number of 40s., or whether any number of 40s. has been incurred upon this alleged breach of the lease. Supposing this to be the state of the case, I have a great difficulty in desiring your Lordships to close up that point concerning which I have been desirous to form the best opinion I could, and think that this should be so ascertained that any judgment pronounced might stand as a regular judgment upon record. I therefore shall move your Lordships not to assoilzie* the appellant from the additional rent, but remit the cause back to the Court of Session in Scotland, to enquire and find what number of acres the defender became bound to cultivate in the manner set forth in the form of tack mentioned in the libel, after the first five years of the tack therein mentioned, and what number of such acres were cultivated in any manner contrary to the said agreement, and whether any and what sum of additional rents beyond the annual sum of £51 was incurred, and became due before

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* His Lordship reversed the judgment.

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the 24th of November 1784, when the summons in question was raised, and whether any, with what part thereof now remains due. I put in the last clause upon this account, your Lordships will not be inclined to decide in the appellate jurisdiction for the first time, without evidence of receipts having been given for rent down to Martinmas 1784. It was argued, and with justice, those receipts may be given for liquidated sums, but not to prevent their demanding additional rent. I agree, if given so *nomine*, which I find was the very case referred to the other day, when I was not so able to speak to it; but suppose you receive the rent, the landlord goes on ten years receiving rent every Martinmas, without demand for the ulterior rent, that would be evidence that it was not paid for the additional rent. If there are any receipts to produce, it is necessary they should produce them, if not so, we shall hear no more of them. As to the action, which must be brought *de novo*, I do not believe, after this thing is thoroughly sifted and enquired into, that they will doubt that the best manner of arranging this matter between landlord and tenant, will be to have a tack added to the former, to make it regular and fit; and I own, as far as one can talk beyond the cause, I have a wish the tenant should come under that regulation. It is a hard thing for a landlord to get a tenant upon his estate, that has broke his covenants and held him at defiance, not being able to pay for the breach of his covenants. I hope he will be able to recover upon it."

LORD VISCOUNT STORMONT:—

"After what has been stated by the noble and learned Lord, that there was a great question involved in this cause, which is now perfectly at rest; it is chiefly with a view to that that I now presume to detain your Lordships for a moment, because it certainly would have been a thing of infinite consequence to every landholder in Scotland, if there had been in the breast of any man of legal knowledge, but above all in the breast of the noble and learned lord who has just sat down, any doubt or hesitation with regard to that which was not much argued here, but had been argued below, namely, Whether stated damages, by way of additional rent, in the form of quit rent between the two parties, came under the nature of that penalty from which, by a Court of Equity, they would be relieved.* The noble and learned lord did take up that point, (and I heard it with great satisfaction, at a very early opportunity, the first time I attended this cause, his Lordship state there could be no doubt upon that point), he has now delivered in the most explicit manner, and entertained no doubt upon the subject, and so clear upon it as not to think it necessary for counsel for the respondent to enter into it at large. With respect to the other points, which are comparatively called, and proper-

* It was much argued in the Court of Session, Whether the additional rent was due *ex contractu*, or by way of penalty. If the latter, it was subject to modification; if the former, the whole rents were due.

ly called speciality, I shall not venture to enlarge upon, but only state the manner in which, it strikes me, from the little experience I have had occasionally in matters of this kind. I have heard of many agreements so fair, of a similar nature, but I hope more accurately drawn, but I will state in a very few words what I think of this informal agreement, as I conceive it to have been. I do apprehend in that agreement there can be no doubt as to the extent of the ploughable ground, and the difficulty and confusion has arisen from making use of the word arable, which, as the Solicitor-General very properly stated, was something equivocal, and sometimes meant one thing and sometimes another. But I apprehend the whole purport of this agreement to have been in this form of tack, a kind of general agreement, which is very inaccurately drawn, but in that mode all the clauses were to refer to the tenant: Thus there were to be ten divisions of ploughable ground. I use the word ploughable in the strictest view of arable, ploughable, and improveable. I apprehend what has been done in this case, has been done very frequently in improveable ground; where there is a good deal of moor ground, the landlord makes a separation according to the different nature of his land, for there is a great deal ploughable, and improveable for very good purpose, and a great deal not improveable in any way, but by way of plantations, but I conceive that it was marked out by the division; and if I can state it to your Lordships with a very few words, my reasoning upon it is this. It will appear that the intended improvement required a certain rotation, and a division of the ground into ten improveable parts,—that division was made in the manner marked out in the cause, and made in the presence of the tenant, soon after the tenant took possession, and at a time when it cannot be supposed, as I conceive, that he had any deliberate purpose of breaking the conditions of this lease. Now, supposing him to understand the terms referred to in that form of a lease,—to understand the nature of the obligations he entered into, and was disposed *bona fide* to abide by the terms of agreement. The very first thing that could have occurred to him possessed of the idea, was this, that it was absolutely necessary there should be a division, and to make ten allotments of improveable ground, to enable him to perform the conditions of this lease. In that division, a proportion is allotted for such ground as the counsel at your bar stated to be incapable of being ploughed, and stated to be incapable of any improvement whatever. Would not he have said, You make such an allotment as puts me under an absolute impossibility of fulfilling the conditions of the lease. It occurs to me the lease, I call it so, the form of lease referred to, did require a certain rotation, which was impossible, unless there was an allotment of ten divisions improveable ground, according to the manner in which it was agreed at the bar, and since stated by the noble and learned lord, as matter of doubt at least, whether the moor was improveable or not. Suppose for a moment, in argument it was not improveable, and the tenant disposed to abide by the agreement *bona fide*, it was proper to him to have said, what you are doing is preposterous; you make but nine allot-

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ments, and you should make ten. I am under an absolute impossibility of performing my contract, if you don't subdivide it in order to make them ten. It is not pretended he made such objection, or any objection at the time this division was made. Now, as to the other part, the noble and learned lord seemed to doubt, whether enclosures were not a necessary part of this agreement; it was very natural that should occur to any man who takes his ideas of agriculture from the improved state in which it is in this country, there is no doubt, that the performance of the stipulation would have been much more easy, and much more profitable, and very feasible upon the whole; but, in the imperfect state of agriculture in Scotland, we are frequently contented with what is called breaks:—A word that I believe is common to Berkshire as well as to Scotland, and marks the division in which the enclosures are to follow the land; but you don't make them to mark the line of boundary without a wall, which does answer to a degree the purpose, but does not answer it so well as an enclosure would do; but I believe there are many here more acquainted with the business than I am. There are many divisions of land, where the separation is only marked by a kind of ideal boundary, without any fence whatever. In regard to another point, much agitated at the bar, I do own that it appears to me as clear in evidence as anything in figures can be, that the additional rent can only commence in the year 1784, that there cannot be a real claim for additional rent in the year 1783. There might have been a claim for damages, but not for additional rent. I conceive, that what the tenant was bound to perform was this, that the ground should be laid down in sown grass in the year 1783. I should have doubted very much whether he could have been held to have performed his contract, if he had laid it down in grass in the end of 1783, because the words are, it ought to have been laid down in sown grass in the year 1783."

" LORD CHANCELLOR:—

" The words are," " By the end of the first five years of this tack, " and thereafter during the currency of the same, and at the end thereof, or his removal, to have one half of the said arable land, or five of " the said breaks, consisting of half of the old infield, and half of the " old outfield, to be in grass sown out with grass seeds as after mentioned." My Lord, if he had sown at that period of the year it might have been different."

" LORD STORMONT:—

" The idea of the landlord and the tenant, at this time was, it should be sown in the spring, in the usual way of sowing grass in Scotland, when you sow it with oats. What my great difficulty is, is with respect to what is now before us. I certainly shall not directly object to your Lordship's motion, or to what comes from so great and so special an authority; but I had considerable difficulty in reversing the decree of the Court of Session, and I should wish that it had been

modified : for the noble and learned lord said, that it can as easily be settled in point of fact. The noble lord seemed to say, where is the number of acres specified ? Now, I do apprehend in some part (I have not had the patience the noble lord has in reading the whole of these voluminous papers), but I do conceive, I heard it at the bar, not argued by counsel ; but in some part of the original papers, there is a demand of 80 acres as half of the farm. Now, that is very fairly specified, they name particularly the number of acres in point of fact—they claim for 80 acres qualified as one half part of that farm.

“ I have no doubt your Lordships will do that which the regularity and order of your proceedings, and the attention that is due to all the forms of justice shall warrant ; but I am afraid that even now, by the mode proposed, no good will follow. What I apprehend as the mischief to arise from this mode of proceeding, that there will be a very considerable additional expense incurred : and it was remarkable what was thrown out at the bar in defence of the appellant, that he being in such a situation that any additional expense should be matter of indifference to him, because, though expenses are completely denied to him, it cannot affect him.

“ It seems to me to be a thing much to be wished—it should be the earnest wish if possible, to avoid putting it into that shape, which will be ruinous to him who certainly is in the right. It is said, as I conceive, in that respect it would be much more serious to him than to the appellant, he will be, by the principle laid down by the Court of Session, decreed to pay a much larger sum, because, for the same reason, what applies to 1784 will apply to 1785 and 1786, and so on, and thus there will be a very considerable expense incurred by it. A decree against the appellant, which decree, though it shall oblige, as far as it can, the appellant to pay a much larger sum, perhaps three times the sum now decreed against him, will be no real benefit to the pursuer, (respondent), because the appellant is a pauper and a ruined man,—he states himself to be such, and what I contend is, in my apprehension, a most unfavourable circumstance annexed to the ruinous state and spirit of litigation, that he builds his hopes upon, the certainty that no damages—that no decree against him, can affect him in any respect whatever, or be of any advantage to the original pursuer. This is the light in which that subject has appeared to me. I beg your Lordships’ pardon for having stated the opinion that occurred to me. I certainly don’t object to the mode now proposed by the noble and learned lord, though it was the wish of my mind some other methods, which would have led more rapidly to substantial definitive justice—namely, by modifying the decree, and confining it to £160 instead of £200 additional rent, that the tenant has occurred for mislabour in the year 1784.”

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“ LORD CHANCELLOR:—

“ The noble and learned lord has certainly made me more satisfied

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than I was before, in respect of having formed this resolution I have proposed to your Lordships, which has shut up no point against them. I have taken as much pains as in my power to make it correspond exactly with the views of the great point the gentlemen were obliged to contend upon, as it appears at the bar, and in all probability did so in the Court below, trying to find out those facts alleged and proved throughout the whole of the case, to make it impossible to assign the particular damages that ought to be given; and being clear the Court, in giving those damages, did not go by a rule of that sort, nor find themselves within the terms of the contract, I can assure your Lordships neither myself, nor with any assistance, by all the questions I could put to the bar, could I find out those terms upon which that calculation could be made. The noble lord has mentioned a great number of topics, and argued them very ably, and has raised doubts, and if any of your Lordships have entertained those doubts, I wished to have them stated, and as those contracts go to a great number of other estates, I think it would be advantageous it should be so settled. If he thinks proper to go on with his tenant he will be obliged to raise a process for subsequent years; and to confine the process as it ought to be, I would undertake to draw in the compass of 40 out of that 502 sheets, all the material allegations. They never begin with proving nor end in alleging. I will undertake to draw my conclusions to be formed in that libel that ought to be the beginning of the subject, within 40 sheets. I should suppose this, by the manner of the proceedings obliged them to come to a more formal tack, I should think they would rather begin with subsequent years, than waste money upon what it is suggested the enquiry does go to, that except the mere stating of the instrument, nothing more has been done to elucidate the conclusions that ought to be drawn. I really thought there was a great deal of ground respecting the manner of agriculture; it was laying the ground to contend those should be actual enclosures. I observe, among other articles, the landlord has reserved to himself the right of enclosing grounds if he pleased, or that the tenant should enclose, and he should pay half. I apprehend, that liberty which he has reserved to himself related to the enclosures of lands when he intended to charge the other party with one moiety, I rather believe it was the intention of the landlord to leave the tenant to make the enclosures and pay for it at the end of the time, or for the landlord to make them, and charge the tenant half, and fix him with several articles to be enclosed. The noble lord says truly, that the tenant himself alleges that certain grounds were scored out to be enclosed in that manner. I wish that we may make no innovation in the law of Scotland with respect to grounds that he held. If by tack land be taken for more than one year, all the agreements must be in writing. I conceive, what succeeded the scoring out the ground in the presence of the tenant and by order of the landlord to amount in point of legal conclusion, to nothing more than an agreement between them in the coun-

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try, that such and such was the extent of the ground that was to be the subject of their covenants. Undoubtedly, it is to be wished they could have a judgment in the regular form that must have the effect of a verdict. If he lets this land at 12 shillings an acre, you would never insist he should take 10 shillings. The regular course would be to make a formal tack of the matter, mentioning the terms: as, 1st. What was the agreement of the party for the land subjected to this particular tillage? 2nd. How much the tenant did mislabour? and, 3. How much was due? Thus computing the acres that turn out for that mislabour. Those terms I don't believe will rise to the extent the noble lord imagines. I flatter myself, when reduced to points like this, they will not go to that immense expense they have gone through, there is no evidence in all that judgment on those points; and to be sure these facts must be ascertained. On the other hand, I am very ready to say, if I could find a single acre specifically brought within the description proposed, I would give him 40 shillings for that, and it would be of more advantage to the gentleman to take 40 shillings than nothing at all. In point of fact, it seems to be of no consequence what he gets here, as the appellant comes as a *pauper*—no other costs will be incurred hereafter to him—it does not seem very material what your Lordships give now. If I were to allow myself to form a judgment upon this case, abstractly from the allegations and proofs, judging of it respecting him, as far as I am able, he would not do a thing contrary to general justice. I enter into his feelings; the gentleman has been exceedingly ill used upon this case, by putting it off to be argued,—If I could raise the point otherwise I should,—but I don't think it worth while for the gentleman himself."

It was therefore ordered that the interlocutors complained of be reversed, and that the cause be remitted back to the Court of Session in Scotland, to find what number of acres the defender became bound to cultivate in the manner set forth in the form of tack mentioned in the libel, after the first five years of the tack therein mentioned, and what number of acres were cultivated contrary to the said agreement; and what sum of additional rent, beyond the annual sum of £51, was incurred and became due before the 24th November 1784, when the summons in question was raised, and what part thereof now remains due.

For Appellant, *William Adam, William Alexander.*

For Respondent, *Sir J. Scott, Robert Blair, A. Cullen.*

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MITCHELL

r.

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STATE.

[Mor. 7928.]

REV. MR. MITCHELL, Minister of the United } *Appellants* ;
 Parishes of Tingwall, Whitnesh, &c. }
 OFFICERS OF STATE, *Respondents.*

House of Lords, 22d May 1789.

AUGMENTATION OF STIPEND—JURISDICTION.—Held, that the Court of Session, granting once an augmentation to a minister of the parish, is not precluded, as Commissioners of Teinds, from afterwards granting a second augmentation,—this being within the jurisdiction and powers of modification conferred on the Court.

The appellant, minister of the populous and extensive parish of Tingwall, &c. in the northern extremity of Scotland, enjoyed only a stipend of 1000 merks, (£55. 11s. 1½d. sterling), together with £5 for communion elements, applied for an augmentation of stipend, in the usual way, to the Court of Teinds in Scotland; and the question of law raised in his application was, Whether a decret pronounced by the present Court of Commission for Plantation of Kirks and Valuation of Teinds, by which the stipend was modified, on a former occasion, to a minister of the established church, precludes that Court from taking cognizance, at any future period, of the situation of the parish, and of again modifying a stipend, suited to the alteration of circumstances which may have taken place since the former decree of modification was pronounced? Or whether, notwithstanding such former decret of modification, the Court may again resume the consideration of the situation of the parish?

It was objected, that the Court of Session had no jurisdiction to modify a second stipend, because, having once exercised the powers of augmentation, conferred and modified a stipend to the minister of the parish, the powers of the Court were completely exhausted, so as to preclude them from again considering the circumstances of the parish, Feb. 21, 1787. and modifying a new stipend. The Court, of these dates, July 4, 1787. dismissed the process.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The decret arbitral of King Charles the First, had in view, not only to relieve the landowners from the oppression of the titulars; but likewise to

secure to the clergy such stipends as might enable them to live in a manner becoming the situation in which they were placed. Accordingly, ample powers of augmentation were conferred on the Commissioners for Plantation of Kirks and Valuation of Teinds, and they were not fettered by any limitations with respect to the maximum of stipends, in the same manner as all former commissions had been, and the limitation for which the respondents contend is altogether inconsistent with the spirit and intention of the decrees arbitral pronounced by Charles the First, and the Commission 1633, c. 19. It is, besides, inconsistent with the words of the various Commissions issued from time to time, and the practice of the Court.

Pleaded for the Respondents.—The Commission of 1707 gives no power, after the Court has once modified a competent stipend, to augment and reaugment at pleasure and discretion. Their powers, once exercised, cannot be again resumed; and, to hold the contrary doctrine, would just be to lay a precedent that would lead to inextricable confusion. There must be a limit somewhere, or none at all; and where a decree is adduced fixing a stipend above the minimum, that ought to bar any further application. This, upon the most sound view and construction of the acts and practice of the Court, appears to be the rule applicable to the present case.

After hearing counsel, “and due consideration had of
 “ what was offered on either side, in this cause, and
 “ having considered the terms of the decree of modification and augmentation, which, as the libel alleges,
 “ was obtained by the minister of the said united
 “ parishes in the year 1722, and that the minister
 “ was, in consequence thereof, allowed to possess the
 “ *ipsa corpora* of the teinds till lately, when the heritors proceeded to obtain a decree of locality; it is
 “ ordered that the several interlocutors complained of
 “ be *reversed*; and that the cause be remitted back
 “ to the Court of Session in Scotland, as Commissioners for Plantation of Kirks and Valuation of Teinds,
 “ in order that parties may be further heard upon the
 “ effect of the above circumstances, and upon the state
 “ of the teinds in these united parishes, without prejudice to any other plea or argument which either of
 “ them may adduce, and that the said Lords Commis-

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“ sioners may then give their determination accord-
“ ingly.”

For Appellant, *William Adam, Wm. Robertson.*

For Respondents, *Ilay Campbell, Geo. Buchan Hepburn.*

NOTE.—Lord President Hope stated, in the case of Preston Kirk, in reference to the above case, “ I know something of this case of Tingwall; and the circumstances attending it made some impression on my mind, as it was the first cause I pleaded in the House of Lords. The House of Lords felt no difficulty on the general point. They did not determine the case of Tingwall upon the specialities. These were no doubt noticed by the Lord Chancellor, when he delivered the opinion of the judges; but they were noticed for a very different purpose, and to a different effect. The doubt which the Lord Chancellor mentioned of the *ipsa corpora* of the teinds was, whether the possession of the *ipsa corpora* of the teinds, for more than 40 years, founded on the title of incumbency, was not sufficient to carry a prescriptive right to the whole teinds in all time coming. In deciding the Tingwall case, his Lordship stated most distinctly that it would be productive of the most pernicious consequences not to adhere to the decision in the case of Kirkden; and in consequence he did adhere, and did mean to adhere to the same principles, by reversing the decree.”—Vide case of Preston Kirk.

[Mor. 2315.]

MISS FRANCES HAY, a Minor, and Her } *Appellants;*
Curators.

ROBERT HAY, Esq., of Drumelzier, } *Respondent.*

House of Lords, 25th May 1789.

ENTAIL—SUCCESSION—HEIRS MALE.—Circumstances in which the words “ *heir. male*” in an entail, received a strict technical interpretation, though they had been used with the same meaning, so far as appeared from the deed, as that of “ *heirs male of the bodies*” of the substitutes, which had been used in other parts of the deed.

By settlement made in the form of an entail by Sir Robert Hay, he disposed his estate to himself and his sister, Mrs. Margaret Hay, in liferent, and “ to the *second* lawful son to

“be procreated of the body of the Most Honourable John Marquis of Tweeddale, and the lawful heirs male of his body in fee; whom failing, to the said Marquis his *third* lawful son, and the lawful heirs male of his body,” and so on to all the Marquis’s sons, and the heirs male of their bodies; and then to the Honourable Charles Hay, his brother germain, and the lawful heirs male of his body, &c., whom failing, to “Alexander Hay, second son of Alexander Hay of Drumelzier, and his lawful heirs male,” and so on through other substitutes to the heirs female of the body of the said John Marquis of Tweeddale.

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The heirs were taken bound to assume the surname and designation of Hay of Linplum, and to use the arms of the family. There was also this declaration, “That it shall not be lawful to the said second son to be procreated of the said Marquis, or the lawful heirs of his , (a word, supposed to be *body*, wanting in the original), nor to any of the said heirs of tailzie, nor their descendants, to alter, innovate or change the destination, or course or order of succession before written.” Then follows a prohibition against contracting debt, or granting leases for any longer space than 19 years.

Sir Robert Hay died without issue in 1751. His sister Margaret died a few months thereafter; and no younger sons being then in existence of John Marquis of Tweeddale, the succession to this estate of Linplum, under the above deed of entail, devolved upon Lord Charles Hay, who also having died without issue, the estate devolved on the next substitute, Lord George Hay. This last individual afterwards succeeded to the honours and estate of Tweeddale, and died without issue in 1787. Alexander Hay, second son of Alexander Hay of Drumelzier, having predeceased his father without issue along with his elder brother William, the respondent his younger brother competes with the appellant. The appellant claimed as heir female of Marquis John, the intermediate substitutes having also failed. The respondent stated that he was heir male in general of Alexander Hay, his said elder brother, who is called immediately after Lord George Hay, (Marquis of Tweeddale) last in possession, and before heirs female.—And the appellant claimed, as daughter of Lady Charlotte Hay, and granddaughter of John, fourth Marquis of Tweeddale, who besides being heir general of Sir Robert Hay’s family, claimed also as heir female of Marquis John.

The case came on for discussion, in a competition of brieves

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before Lords Monboddo and Ankerville assessors. And the question, which was reported to the whole Court, came to be, Whether the expression “lawful heirs male,” as applied to Alexander Hay, was to be restricted to “heirs male of the body,” or to have a more comprehensive interpretation, and to include collateral heirs male?

The Court preferred Robert Hay, the respondent, holding that judgment must be given according to the technical signification of the term, which they thought unambiguous, and not according to the intention, though that intention was obvious and manifestly adverse to such construction.

July 24 1788.
Nov. 25 1788.

Against these judgments the present appeal was brought.

Pleaded for the Appellant.—Though, to impose fetters, the maker of an entail must use certain *verba solemnia*, which courts of law can neither supply nor explain from collateral circumstances, yet a different rule holds where the question is, Who is entitled to succeed according to the description of heirs marked out by the deed?—every latitude of construction being allowed *ut effectum sertiat voluntas testatoris*; and the question comes to be, *inter hæredis*, What heirs were meant, under the terms “lawful heirs male,” in the substitution to Alexander Hay, second son of Drumelzier? The question ought not to be determined upon any supposed technical rule, but agreeably to the obvious intention of the testator, as this intention appears from the general tenor of the deed. In the present case, that intention is clear in favour of the appellant, from the whole words, clauses, and accidents of the deed. But further, in tailzied succession, where different nominatim substitutes are called in their order, the legal acceptation and meaning of the term heirs, or heirs male, or heirs female, is that the heirs of that description, who are descendants of each substitute, are alone admitted to the succession; whom failing, the next *nominatim* substitute and his heirs descendant. It is therefore to heirs male descendant of the *nominatim* substitute that are here meant; and as the respondent is merely a collateral heir male of his brother, Alexander Hay, second son of Drumelzier, he cannot succeed or be included within that description.

Pleaded for the Respondent.—The term “heirs male” is as much fixed and determined as any technical term whatever. It includes not only male *descendants* but *collateral males*; and as the respondent is heir male of

his elder brother Alexander, he is entitled to take the estate in that character. The term heirs male is not of a flexible nature. It has a distinct technical meaning, and includes all heirs male, whether of the body or collaterals. It cannot be applied to heirs of line, because then it would include heirs female, and it cannot be construed only to mean descendants, because then it would exclude brothers, for construction, or presumptions, just because there is on uncles, and nephews. Hence it follows that there is no room for a *questio voluntatis*.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Ilay Campbell, J. Scott, T. Erskine.*

For Respondent, *Alexander Wight, William Tait.*

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MORTON.

ALEXANDER GRANT of Edinburgh,	.	<i>Appellant ;</i>
EARL of Morton,	.	<i>Respondent.</i>

House of Lords, 8th June 1789.

LEASE—REMOVING.—A lease, with a clause generally against subsetting, permitted the tenant to subset part of the subject, which was done accordingly. No rent was ever paid by the subtenant to the landlord, nor to the tenant from whom he had his sublease, while there was a clause in the lease that the tenant should be liable in payment of the rents of the whole subject. The tenant failed, and an action of ejection being raised and decree passed, Held that the decree of removing was a good decree, although only raised against the principal tenant, and clearly entitled the landlord to eject the subtenant from the part held by him.

The Earl of Morton set by lease to Alexander Rodger, his heirs, (excluding assignees and subtenants), the farm of Haggs, with the pertinents; the farm of Cumberland, with pertinents; the houses, lands, crofts, and acres, in the town of Dalmahoy, with pertinents; and, lastly, the farm of Burnwynd, with pertinents, all lying in the barony of Dalmahoy, and county of Edinburgh, and that for thirty years from Martinmas 1771, at a rent of £147. 10s.

There was this clause in the lease:—"That notwithstanding the prohibition to subset, the said Alexander Rodger and his foresaids shall have liberty to subset the pendicle

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beyond the Moss, and the houses at Burnwynd ; the houses of Cumberland, and the houses in the town of Dalmahoy ; he and his foresaids being always liable to the Earl and his foresaids for the whole rent before mentioned, without any regard to these subsets."

The appellant Grant, took a sublease from Rodger, of the dwelling house and Mains of Dalmahoy. There was no rent specified, except that he was to pay a rateable proportion of what he, Rodger, was obliged to pay the Earl for the whole ; and, in case they could not agree, to be fixed by two persons mutually chosen.

The appellant entered into possession. The precise rent he was to pay was never fixed, and he had paid no rent to Rodger for many years, there being other transactions between them, which made Rodger considerably the appellant's debtor. In the meantime, Rodger fell several years in arrear of his rent to the respondent, and, after many plans and efforts to pay off these arrears, a sequestration was awarded and executed, while at the same time, an action of removing under the Act of Sederunt, was brought against Rodger.

In this removing before the Sheriff, the appellant Grant appeared, and contended that the part of the farms subset to him was not included. The Sheriff ultimately decerned in the removing, both against Rodger and his subtenants.

A suspension and reduction of this decree were then brought, and, after various procedure, the decree of removing was found orderly proceeded in, and Rodger ejected.

Thereupon the Earl proceeded to take possession of the grounds occupied by the appellant, as the subtenant of Rodger, when the present bill of suspension was brought by the appellant, on the ground, 1st. That his under lease from Rodger was not determined by the decree of removal against the principal tenant ; 2d. That what had passed between him and the respondent's steward, was equivalent to a new lease from the respondent ; 3d. That he owed no rent, so that the foundation of the proceedings against Rodger did not apply to him ; and, 4th. That he had no warning or notice to remove.

Feb. 7, 1789. The Lord Ordinary, after reporting the case to the Court,
Mar. 11,——refused the bill. On reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The decree of removing obtained against the principal lessee in the present case, never

can be a ground for awarding execution against the appellant, his subtenant, 1st. Because the appellant, who had obtained possession on his sublease, was not made a party to the suit; 2d. Because the decree was obtained for a special purpose, in order to enable Rodger's creditors to sell his leases for their payment, which was the sole object of the decree. Besides, the appellant's possession under the sublease was recognized by the landlord in a variety of acts which led him to believe, that the subset would be good to him for the full endurance of the lease. Further, the decree cannot authorize the proprietor to eject the appellant from his subset lands, as those lands are not mentioned in it.

Pleaded for the Respondent.—By the lease to Rodger, he was permitted to subset certain parts of the lands, but even as to these, it was declared, that he was to continue liable in payment of the rents to the landlord, without regard to those subsets, and therefore it is of no consequence to inquire whether the lands said to have been subset by him to the appellant, were included in those for which he had the permission, nor whether any formal subset was in fact made; as the appellant was never recognized as a tenant by the respondent, or ever paid or tendered rent as for himself, the respondent has no concern with him. The principal lease being voided, and decree of ejectment obtained against Rodger, and all dependant on him, it is impossible that possession can be maintained, by virtue of any right flowing from, or agreement made with him, which must all fall with the original or principal right. The Act of Sederunt 1756, regulating the process of removing, expressly declares, that a decree against the principal tacksman shall be effectual against assignees or subtenants. It is a mistake to say that the decree did not include the lands subset to the appellant. It includes the whole farms with their pertinents let to Rodger. The farm of Haggs is mentioned; and it is admitted that the lands subset to the appellant are a part of the farm of Haggs.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellant, *Alexander Wight, William Tait.*

For Respondent, *Ilay Campbell, W. Dundas.*

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[M. 6269.]

WOOD, &c.

v.

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MESSRS. JOHN WOOD & Company, Ship-builders in Port Glasgow, MESSRS. BROWN & Company of the Saltcoats Rope Work, & Others, } *Appellants;*

ARCHIBALD HAMILTON, Trustee on the Sequestrated estate of JAMES & PATRICK HUNTER, Merchants, Port Glasgow, } *Respondent.*

House of Lords, 15th June 1789.

BOTTOMRY—HYPOTHEC.—Hypothec does not attach for repairs executed while the ship is in a home port.

Nov. 24, 1784. Of this date, James and Patrick Hunter, merchants in Port Glasgow, were sequestrated, and, under the bankrupt act, the respondent was appointed their trustee.

Among their effects was a ship of the name of Rebecca, then lying in harbour at Port Glasgow, upon which the appellants had sometime previously executed considerable repairs, and some of the appellants were actually repairing the vessel at the date of the sequestration. The question was, Whether they had a preferable right or hypothec or lien over the ship for the amount of the repairs?

Jan. 24, 1787. The Lord Ordinary sustained their claim of hypothec, but, on a reclaiming petition to the Court, it was contended, 1st. That there was no hypothec, when the furnishings are made on contract with the owner; 2d. That the tacit hypothec, or bottomry right, extends only to repairs executed in foreign port, and only *for the last voyage*, unless constituted by bill or bond of bottomry; 3d. That if any hypothec lay here, it could only be for the last furnishings made to the Rebecca at the date of the sequestration, and not for old repairs.

The Court ordered the opinion of English counsel to ascertain the practice of England in such cases; upon considering which; they found “That the respondents (appellants) have no hypothec, or right of bottomry on the ship in question.” By a subsequent interlocutor, on reclaiming

July 29, 1788. petition, the Court found, “that the respondents (appellants) have no hypothec or right of bottomry on the ship in question.” Another reclaiming petition was presented, contending for the appellants:—That there was no distinc-

tion between home and foreign repairs, and, consequently, it made no difference, whether the master or owner contracted for the furnishing, or whether these were furnished in the home port where the owner resided. The respondent insisted that there was a solid distinction between home and foreign repairs, the privilege of hypothec attaching only in the latter case; and that, by the law of England, a tradesman who repairs or furnishes materials for a ship, the owner of which resides in England, does not acquire any lien upon the ship, but is a mere personal creditor: The same law must apply here. It was replied, that this question must be tried by the principles of the law of Scotland, as the *lex loci contractus*; and these principles being clear, according to the decisions in favour of the appellants, there was no occasion to resort to that law; and therefore their hypothec attached.

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The Court adhered; but remitted “to the Lord Ordinary Feb. 24, 1789. “to hear parties on the right of retention claimed by the “petitioners John Wood & Co.”

Against these interlocutors, in so far as they found that the appellants have no hypothec or right of bottomry on the ship in question, they brought the present appeal.

Pleaded for the Appellants.—1. The right of hypothec in favour of the repairers and furnishers of a ship, is founded on the Roman law, recognized and observed in most nations of Europe, and is now, and has been the law of Scotland from an early period. And in determining such questions in Scotland, the practice has always been, to allow of such hypothec for repairs, without making any distinction, whether the same were made in a home or a foreign port; 2d. But, separately, whatever be the law of England, it is clear that the present question must be determined by the law of Scotland, as that law stands recognized, acted upon, and confirmed by the universal understanding of the kingdom; and they further maintain that the distinction now set up between repairs and furnishings in a foreign and home port, has never been until now heard of in that law.

Pleaded for the Respondent.—1st. The right of hypothec upon a ship for repairs, to the person repairing or furnishing the vessel at a home port in Scotland, on the order of the owners residing at that port, is not recognized by any writer on the law of Scotland. It is only when the vessel is in a foreign port that such a claim arises, and where the master of the vessel may hypothecate the vessel for repairs; but as to

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work at home, it is held as executed upon the personal credit of the owner alone, and not upon the security of the ship. 2d. What has been found to be expedient and advantageous to the commercial law of England, cannot be hurtful to the commerce of Scotland; and as the commercial law of the two countries acknowledges the same origin, the rules of the one must apply to the other.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *T. Erskine, W. Grant.*

For Respondent, *Ilay Campbell, Alex. Wight.*

PATRICK CRAWFORD BRUCE, and PHILIP SAMUEL MAISTER, Esqs., Executors of the deceased CHARLES STEWART, and ALEXANDER DUNCAN, their Attorney,	} <i>Appellants;</i>
JAMES STEWART, Sheriff-Substitute of Kinross, and GEORGE GRAHAM and Others, his Trustees,	
	} <i>Respondents.</i>

House of Lords, 3d March 1790.

SUCCESSION—GIFT.—A party had made his will in India, appointing executors in this country to execute the same after his decease. Previous to his death, he had expressed a desire to remit a certain sum, £1000 to his father, by a friend who was intending soon to return to this country, and whom he wished to take home the money to his father. This friend ultimately got the sum to take home for that purpose, but accounts of the donor's death reached England before delivery of the money. In this case, the executors under the will claimed the same; Held that the father was entitled to the money, the gift being absolute and complete during the life of the donor.

Charles Stewart had, for several years prior to 1783, been settled at Bombay, in the Civil Service of the East India Company. Having a prospect of bettering his fortune, from being appointed paymaster to the army then proceeding against Tippo Saib, he made his will, leaving and bequeathing the whole he might be possessed of, to and for the use of his two infant natural children, and appointed the appellants as his executors.

When attending this expedition, he met an old friend, Captain Dundas, who bargained with him for some sandal wood. Mr. Stewart, in return, asked Captain Dundas to take home a sum of money to his father in Scotland, which he agreed to do. This sum of money, 9600 Rupees, (£1079. 18s.) was thereafter handed over to Captain Dundas' purser, Mr. Dorin, to be taken to Captain Dundas, who soon after sailed for England with the money. In the meantime, the expedition against Tippo Saib had become a failure. The English army was invested, and the officers taken prisoners; in which Mr. Stewart, along with others, lost their lives.

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A demand having been made for the money, both by the father of Mr. Stewart and the appellants, the executors under his will, a multiplepinding was raised, to settle which had best right to the sum, and, upon proof of the above special destination and gift of the money to the father: the Lord Ordinary pronounced this interlocutor. "Having considered the depositions of Captain Dorin and Captain Dundas, prefers the said James Stewart to the sum in the hands of the raiser of the multiplepinding, and decerns in the preference against the raiser accordingly." On reclaiming petition to the Court the Lords adhered.

Feb. 9, 1788.

Aug. 5, 1788.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The appellants, as the personal representatives and executors of Charles Stewart, must be entitled to the money in question, in competition with the respondent, Stewart, unless he can show that the testator, in his lifetime, made an absolute gift of it to him. The evidence makes it only probable that Charles Stewart once intended the money to be put in to the respondent's hands, and perhaps he might have intended that some benefit was to result to him from the remittance; but it is clear, from his reference to written instructions, to be given thereafter, that he died without completing any gift or absolute disposal of the sum in question.

Pleaded for the Respondents.—Where money is contended to be given to another, the intention of the donor, whether that intention be manifested by parole or by writing, if attended by sufficient evidence, makes the gift complete. The most essential, and the strongest proof of the intention of the donor, is the delivery of possession, by which the gift becomes effectual in law against all mankind, unless it be prejudicial to creditors, though made without

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any consideration ; and it is not in the donor's power, much less in that of his executors, to retract it. It is impossible to doubt the nature of the evidence that has been adduced to support the delivery of the gift, because that evidence clearly shows, not only that Charles Stewart formed the resolution of sending a sum of money to his father by Captain Dundas, but that resolution was in fact carried into execution by the actual delivery of the box of rupees to Mr. Dorin for the use of his father the donee. Every thing therefore which law requires to make a complete gift, has been shown to have taken place, and, consequently, the respondent James Stewart is entitled to recover the money.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *E. Bearcroft, Wm. Alexander.*

For Respondents, *J. Anstruther, Jas. Allan Park.*

JAMES ROCHEID of Inverleith, Esq.,	<i>Appellant ;</i>
SIR DAVID KINLOCK of Gilmerton, Bart.,	<i>Respondent.</i>

House of Lords, 22d March 1790.

ENTAIL—CLAUSE.—A lady made an entail of her estate in favour of a certain series of heirs, under this condition, that her sister Elizabeth “ shall execute a tailzie of her half of the estate, according to the same order of succession.” She executed an entail, but not to the same series of heirs. A declarator being brought : Held, by the Court of Session, that the condition was virtually complied with. Reversed in the House of Lords ; and held, that the entail executed by Elizabeth Rocheid, did not sufficiently comply with the condition, and that the fourth part, held by Mrs Kinlock, must therefore be free from the fetters of her entail.

Sir James Rocheid of Inverleith and Darnchester, died in 1737, leaving his estates, held by him in fee simple, to descend to his four daughters as heirs portioners.

One of these daughters was married to Sir Francis Kinlock of Gilmerton. She was entitled to one fourth ; her sister, Mrs Elizabeth Rocheid, had two fourths, or *one half* of these estates, (from having acquired the fourth of a sister deceased, and the other fourth descending to her in her own

right); the remaining fourth belonged to the children of the other deceased sister.

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Lady Kinlock and Mrs. Elizabeth Rocheid had expressed a desire to put their three-fourths together, and, by entail, make it descend to Lady Kinlock's second son, as a distinct representation of the Rocheid family.

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Accordingly, Lady Kinlock executed a settlement, under the strict fetters of an entail, with this express quality and condition, that the fetters she thereby imposed, should not be binding, unless her sister, Mrs. Elizabeth Rocheid, should entail her two fourths upon the same series of heirs.

Feb. 25, 1744.

Mrs. Elizabeth Rocheid did execute an entail of her fourths in favour of Lady Kinlock's younger son, but not exactly to the same series of heirs appointed to succeed on his failure by Lady Kinlock's settlement; and the question was, Whether this fourth, which belonged to Lady Kinlock, was subject to the strict fetters of an entail, or free therefrom, and the absolute property of the appellant, to whom both, in the meantime, had descended. Reduction and declarator being raised, to have it so found, the Court adhered to the interlocutor of the Lord Ordinary, sustained the defences pleaded for Sir David Kinlock and others, and decerned.

Aug. 2, 1788.

Jan. 13, 1789.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The clause in Lady Kinlock's settlement is decisive of the question. The condition expressed in the first part of it is, that Elizabeth Rocheid "shall execute a tailzie of her half of the estate, according to the same order and course of succession;" and if she fails to do so "then, and in such case, &c." her heirs are declared to be free from the fetters of the entail thereby made by her. The words "according to the same order and course of succession," are enunciatory of her will. These words cannot be thrown aside, or rendered of no effect or signification; they pervade and control its true sense and meaning. The meaning of the words "according to the same order and course of succession," is clear, and so also is the purpose for which it was so inserted. The object obviously was, that unless her sister's two fourths of the estate, went along with her fourth, there was no use and no propriety in making an entail in regard to her fourth; accordingly, she did not intend to impose fetters on that fourth in all events, but only in the event of her sister conveying by tailzie, her two fourths to the same

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series of heirs, which not being done, leaves Lady Kinlock's portion of the estate unfettered.

Pleaded for the Respondent.—The construction put upon the condition in Lady Kinlock's entail is unwarranted by the expressions in, and by the whole entail itself. The words being, that in case the shares belonging to Elizabeth Rocheid, shall not, by settlement made, or to be made by her, descend to the said David Kinlock, my son and my heirs of tailzie" &c. then her heirs were not to be fettered by prohibitive, irritant and resolute clauses therein. These words are clear and obvious, and mean, that if her sister's two fourths were to descend to her younger son and her heirs of tailzie, that then and in that event, they should be subject to the fetters imposed. But as it cannot be denied that the two fourths of Mrs. Elizabeth Rocheid did actually descend, and were in point of fact conveyed to her younger son and her heirs of tailzie, and both have descended through him to the appellant by virtue of these very settlements, it is of consequence, that by Lady Kinlock's settlement, her share is made to descend on her second son David as institute, and by her sister's entail, Alexander her third son is institute, because the reason of that change in the destination was made necessary by the second son David succeeding in the interval to his father's family estate of Gilmerton, whereby he was disabled by the express conception of Lady Kinlock's settlement from succeeding, and by the very intention of the whole arrangement. But it is not only David Kinlock, the second son, that is bound, it is also "my heirs of tailzie;" and accordingly the question is, whether the appellant has succeeded as an heir of tailzie or not. By Lady Kinlock's settlement, the persons who alone are declared to be free in the event of her sister not conveying to the same series of heirs, are, "The said David Kinlock, or any of my heirs of tailzie, who shall happen to be in possession of my said lands and estate, and shall happen *not* to succeed as heir of tailzie to my said sister in her share of the lands and other heritages before specified, and all my other heirs of tailzie, *afterwards* succeeding in my said lands and estate." It is clear that he has succeeded as heir of tailzie to Lady Kinlock's share, and that he has also succeeded to Mrs. Elizabeth Rocheid's two fourths in the same character, and therefore, in order to be free from the fetters, he would require to show that he has *not* succeeded to Mrs. Elizabeth's two fourths as heir of tailzie. When, therefore, the whole deed

is considered, and not one part of a clause merely, it is clear that the appellant can only enjoy under the fetters.

After hearing counsel, it was

Ordered that the interlocutors complained of be *reversed*, and it is declared and adjudged that the settlement of the half of the estate of Inverleith and Darnchester, belonging to Elizabeth Rocheid, does not contain a sufficient tailzie to fulfil the condition imposed by the settlement of Dame Mary Kinlock of her own fourth of the said estate, and consequently the pursuer is entitled to hold, possess, and enjoy the said one fourth part of the lands and barony of Inverleith and Darnchester, teinds, and others contained in the said deed of settlement, and that in fee simple, as heir male of the deceased Alexander Rocheid his father, and heir of provision of the said deceased Dame Mary Kinlock his grandmother, without being subject or liable to any of the conditions, provisions, restrictions, and clauses prohibitive, irritant and resolute clauses in the said deed of settlement, executed by the said Dame Mary Kinlock.

For Appellant, *Ilay Campbell, J. Scott, J. Anstruther, Wm. Dundas.*

For Respondent. *F. Bower, Alex. Wight.*

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[Mor. 2418.]

MAGISTRATES OF EDINBURGH,	.	.	<i>Appellants ;</i>
COLLEGE OF JUSTICE,	.	.	<i>Respondents.</i>

House of Lords, 23d March 1790.

COLLEGE OF JUSTICE—PRIVILEGES.—Held, that the members of the College of Justice were not liable in assessments for the support of the poor, within the city of Edinburgh.

This was a question, Whether the Members of the College of Justice had any exemption from being taxed for city poor rates. The Court of Session had decided they had a clear exemption, in virtue of privileges granted by the Parliament when the College was first instituted, viz. 1. The privileges granted to the College of Justice prior to the establishment of the poor law in Scotland, which was in

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1579. 2. The general enactment of the statute law with respect to the maintenance of the poor. 3. The acts in favour of the College of Justice, subsequent to the establishment of the poor laws upon their present footing. 4. The usage which has taken place in time past.

The magistrates having resolved to assess the whole citizens without exception with a poor rate of 2 per cent., the Dean and Faculty of Advocates, as Members of the College of Justice, brought a suspension. The Lord Ordinary, of this date, (29th Jan. 1788), suspended the letters simpliciter.

The magistrates having appealed to the House of Lords,

Pleaded for the Appellants.—(Sir John Scott.)—The members of the College of Justice had submitted at various times to taxes imposed within the city. In particular, in 1690 they submitted to the tax called *hearth money*, paid by all the inhabitants of houses. Again, the act 1 Geo. I. they submitted to, by which the householders within the city are made liable to make good all damages which happen to houses by *mobs*. An outrageous mob in the memorable year 1760 destroyed a popish chapel, and all the members of the College, including advocates, clerks, writers, agents, &c., were assessed, and paid their assessment. Even in regard to the tax for the support of the poor, in process of time the College of Justice seem in part to have given up their privilege, and in part it seems to have been taken away by subsequent acts of supply, and ultimately lost by disuse.

The privileges granted by Parliament to the College of Justice, when first instituted, or at any time prior to the year 1579, could not be intended for establishing an immunity from assessment for the support of the poor, such assessment being unknown at that period; or if it could be supposed that the legislature meant, by anticipation, to confer upon that body a right of exemption from all taxes to be imposed by future statutes, the efficacy of such privilege must depend upon the terms of such future statute. Consequently, if these statutes were so broad as clearly to comprehend them, and made no exemption, or contained no saving clause as to the College; and still more, if the enactment was specially declared to be *without exception* of any person or class of persons, as was the case in the act 1579, this must operate as a repeal of the privilege, in so far as that act, or the tax it imposed, was concerned. As to the acts in favour of the College of Justice subsequent to the establishment of the poor rate, these can be of no avail to

the respondents, as they contain only a ratification of their former rights, whatever these were. And it is therefore upon the construction of these original acts that the present question depends, which, when examined, will be found not to entitle them to exemption from poor rate.

Pleaded for the Respondents.—By the terms of the letters patent establishing the College of Justice, the senators were exempted from the payment of every tax or public burden, and under the general words used, assessments for the use of the poor must be held to be included. So the matter stood when the act of Parliament 1537 passed, upon considering which, it will appear impossible that the legislature, in more anxious terms, could declare an immunity in favour of the judges from every taxation whatever. And again the act 1540 ratified, in the most ample terms, all the privileges granted to the College, either by the pope or the government of Scotland. From these first grants, it is clear, that there was created in favour of the College, both in general and in special articulate words, an exemption from payment of all contributions in general, and from contributions to the poor in particular. And though the senators only are mentioned in the letters patent, and act 1537, it has been shown that the extension of the privileges to the other members of the College was coeval with the institution. And in all the subsequent acts the College is mentioned as comprehending the scribes, advocates, and other officers of the court. The act 1592, enforcing the payment of all taxations within burghs *from all manner of persons* inhabitants thereof, declared it should not be prejudicial to the members of the College of Justice, and their privileges and immunities whereof they had been in use. The act for the support of the poor was passed in 1579, and therefore that tax was unquestionably included in the general words of the act 1592. By the last, therefore, the College was virtually, though not expressly declared to be exempted from poor's rates; but the act 1597 is perfectly conclusive; it was declaratory, *that all who resided within the burghs* with their families, and had a certain income, should be subject to the help of the poor. It was occasioned by persons refusing to contribute, probably as not being burgesses; but here again it is provided, that the law shall not extend to any member of the College of Justice. The act of general taxation passed in 1597, in like manner exempted the College of Justice, and thus there were two acts in one year, both impos-

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ing taxation, and both specially exempting the College of Justice. Besides, there stands the most unequivocal immemorial use and possession in favour of the College, which of itself is decisive of the question.

After hearing counsel,

LORD CHANCELLOR said :—

“ MY LORDS.”

“ There was no doubt, but that almost every exemption from public burdens was in itself odious; but in this case, the respondents had clearly made out a usage for nearly two centuries. It would be a difficult matter to overturn a custom, most likely originated when the members of the College had only transient habitations in the city, such as inmates; but when they became settled householders, it certainly did appear partial to except them from parochial impositions. On the other hand, there were several other acts of Parliament, besides that for the support of the poor, from which they had continually claimed exemptions, and claimed successfully.—The argument, that it would injure *the charity*, was downright nonsense; it was, in other words, to say, that it would injure a fund for the support of idleness and dissipation :—Voluntary charity was indeed a noble principle, inasmuch as it distinguished its objects, and by selecting the worthy, and rejecting the unworthy, became highly useful to society. His Lordship moved the interlocutor be affirmed.”

Accordingly, it was ordered and adjudged that the appeal be dismissed, and that the interlocutors be affirmed.

For Appellants, *Sir John Scott, Solicitor General, and Lord Advocate.*

For Respondents, *Mr. Wright and Mr. Tait, Wm. Adam.*

By the recent act 8 and 9 Vict. c. 83, this privilege, as to the poor rates, is done away with.

GEORGE STEWART, Younger of Grandtully, Esq., and HENRY HERBURN, Slater in Perth,	} <i>Appellents;</i>
JOHN BELL, Slater in Muirend, and JAMES BELL, Slater in Scone,	
	} <i>Respondents.</i>

House of Lords, 12th April, 1790.

LEASE.—A lease let to two parties, the whole slate quarries in the Hill of Birnam. No mention was made in the lease of the slate

quarries of Obney; but their predecessor in the lease, (whose lease was in precisely similar terms to that of the respondents), had possessed the slate quarries of Obney as part of those of the Hill of Birnam, and they took possession of these latter quarries as part of the subject, and wrought it without molestation for five years. Thereafter the landlord let the Obney quarries to Hepburn, Held, in a question raised, that the respondents were entitled to retain possession of Obney quarries, as a part of the subject of their lease, though not expressly mentioned therein; it being the understanding of the lessees that these were included in the bargain, and their possession for 5 years without objection being an homologation on the part of the landlord.

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Sir John Stewart let in lease the slate quarries in the hill or mountain of Birnam, to the respondents, Bells, in the following terms:—"All and haill the whole slate and skailly quarries in the said Sir John his hill of Birnam, with free access, ingress, and regress, to and from the same, and with power to them and their foresaids to open the said hill, at any place or places they shall see proper, for finding out new posts, lying within the parish of Little Dunkeld and shire of Perth, and during the whole space of nine years from and after the said John and James Bell, their entry thereto, which is hereby declared to have been and commence at the term of Martinmas last 1779, and from thenceforth to be possessed by them and their above written, during the space aforesaid."

Under a lease, in precisely the same terms, the respondents' predecessor, Anderson, had possessed the quarries; and it was admitted by the appellants, and proved by a number of witnesses, that Anderson, under his lease, had been in the practice of working the quarries of Obney now in dispute.

But Sir John Stewart, sometime after granting this lease to the Bells, conceiving that the quarries of Obney were not included in the lease to them, granted a disposition of the same to his son, the appellant, George Stewart, who thereupon granted a lease of these to Hepburn, the other appellant.

In the meantime, the respondents had possessed, without molestation, the quarries of Obney for five years. They began their labours there in 1780, and one of them continued to do so until the process for ejecting them was raised by the appellants in May 1785. The appellants having applied to the Sheriff, stating that the Bells had taken possession of the

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quarries in the hill of Obney, on pretence that they belonged to Birnam hill, and praying to have them ejected and removed. In defence, it was stated that they had bargained for the subject as possessed by Anderson, and that their possession of the whole subject had been homologated by Sir John Stewart. They further stated, that they know of no "division between the two hills, or of two separate names belonging to the parts possessed by them. On the contrary, they believed at first, and do still believe, that all which they possess is under the name of the Hill of Birnam." In reply, it was stated that their lease contained no express reference to Anderson's possession, and that they had been permitted to continue to possess the quarries in Obney from Mr. Stewart being ignorant that Obney hill was not expressly comprehended in their lease.

May 20, 1785.

The Sheriff ordered a survey of the grounds, and, upon report of the surveyor, he found "that the hills of Birnam and Obney are separate and distinct hills; and that the burn of Craigleish is the march betwixt them, and ordains the defenders (respondents) to cede to the pursuers (appellants) the slate quarries to the south of the foresaid burn, and to remove therefrom forthwith; but in respect it appears from the plan that there is a small slate quarry on the said march burn, betwixt the moss of Birnam and the mid moss, finds the said small quarry belongs to the parties equally, and falls to be used and digged by them;" and interdict was thereupon granted to prohibit the respondents from working the said quarries.

July 22, 1788.

A bill of advocation having been brought, and a proof allowed, as well as the judicial examination of Sir John Stewart and his son taken. A suspension of the interdict was also brought, which being conjoined, the Lord Ordinary (Lord Braxfield) reported the whole cause to the Lords. After hearing counsel at great length on the report of the proof, the Court pronounced this interlocutor:—"Advocate the cause, sustain the defences pleaded for John and James Bell to the original action before the Sheriff, as soilize them therefrom, and decern: repel the reasons of suspension pleaded for George Stewart and Henry Hepburn; find the letters orderly proceeded, and prohibit them from interrupting the defenders in their possession of the quarries in question during the period of their lease; find the pursuers liable to the defenders (respondents) in the expense of process hitherto incurred, and ap-

“point an account thereof to be given in,” &c. Thoreafter the Court pronounced this interlocutor on the account of expenses; “modify the account to £105 sterling, including “agent fee, and decern.”

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Nov. 22, 1788.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The quarries let by Sir John Stewart were those in the Hill of Birnam, in the parish of *Little Dunkeld*; and the respondents have not only failed to prove that this description includes the quarries in question, but the contrary has been proved on the part of the appellants. It is submitted, that the evidence establishes, that Obney and Birnam are distinct hills, with known boundaries, and these boundaries likewise divide the parish of Auchtergaven from the parish of Little Dunkeld. The map of the county ought to have considerable weight in the scale, because the lines there drawn between the parishes must have been from the information and general understanding of the inhabitants, collected with no view to such a question as the present. Considering all the circumstances in evidence, it is impossible to believe, either that Sir John in granting, or the respondents, in accepting of the lease in the terms it is conceived, could imagine that subjects, to which those terms were altogether inapplicable, or rather, which those terms expressly excluded, were comprehended.

Besides, it was irregular to allow the respondents a proof of all the facts and circumstances, which was permitting the written agreement to be explained by parole testimony, contrary to a fixed principle of law. Further, the respondents having referred the truth of the facts alleged by them to the oaths of Sir John Stewart, and the appellant Mr. Stewart; and they having deposed *negative* to all the allegations, these oaths, according to established law, were conclusive against the respondents, and who ought not to have been permitted afterwards to resort to other evidence.

The acts of possession or working of the quarries in dispute, from whence the respondents infer Sir John's, as well as their own understanding, that they were included in the lease, were not of right but of tolerance; and therefore cannot be set up against Sir John, and much less against the appellant Mr. Stewart, who stands infest in the lands of Obney, and of the quarries, as pertinent thereof, free of all leases which did not exist at the date of the right. The quarries, at the time when the respondents were allowed to

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work in Craig Obney, were not reckoned of value, nor had they any competitor. It is observable that what the respondents principally rely on as acts of possession on their part, and homologated on the part of Sir John, is digging slates for the landlord's own use; but as the expense of digging, and not the value of the slates, was then the chief object, his not challenging the respondents for going out of the limits is noways extraordinary; nor can it support the respondents' inference, that he must have supposed they were keeping within the limits.

Pleaded for the Respondents.—A lease is a *contractus bonæ fidei*, and of course the extent of the subject let must depend on what the lessee understood he bargained for, and what the proprietor appeared at the time to have granted. In the present case, the circumstances that have been stated from the proof, ascertain the real import of the bargain between Sir John Stewart and the respondents: namely, That *Anderson*, the immediate preceding tenant, possessed the quarries in dispute, under a lease in exactly similar terms to the respondents: That the respondents understood at the time that they bargained for the quarries possessed by *Anderson*, and so described their bargain to Daniel Clark, whom they wished to take a share in the lease: That they immediately on obtaining their lease, took possession of the disputed quarries, and continued to possess them undisturbed from Nov. 1780 to spring 1785: That during this long period (the respondents' rent being chiefly payable in kind), they furnished large quantities of slates, chiefly if not altogether from these disputed quarries of Obney, to Sir John Stewart: That Sir John Stewart signified his orders in regard to these slates personally at least on two occasions. All which facts and circumstances are quite inconsistent with the supposition that they hold the quarries of Obney not to be included in the lease.

In point of fact, the hill or mountain of Birnam is a generic term, comprehending a track of country. That name, "Birnam," comprehends the muir of Birnam, the forest of Birnam, and the mountain of Birnam; and the hill of Obney is just a part of the latter mountain of Birnam. Formerly the woods which surrounded it were of great extent, and are accordingly spoken of as a distinguished object in Shakespeare's *Macbeth*; but the mountain is now skirted round with cultivated farms.

After hearing counsel, it was
Ordered and adjudged that the interlocutors complained
of be affirmed.

For Appellants, *W. Grant, W. Adam.*
For Respondents, *Alex. Wight, Al. Maconochie, J. An-*
struther.

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[M. 4617.]

ELIZABETH BRUCE, and MARGARET BRUCE, }
Daughters of the deceased DAVID BRUCE } *Appellants ;*
of Kinnaird, }
JAMES BRUCE of Kinnaird, Esq., *Respondent.*

House of Lords, 15th April 1790.

SUCCESSION—FOREIGN—LEX DOMICILII.—An officer in the East India Company's Service had made several remittances home, with the view of returning to his native country of Scotland. Remittances were on their way home, to the extent of £5708, and were on shipboard when he died in India. He left other estates in India worth £2198, and, together with other remittances to London, his whole personal estate amounted to £9000. James Bruce, the son of the first marriage, and brother consanguinean of Major Bruce, contended, that as the division of this intestate's personal estate must be regulated by the law of England, as the *lex domicilii*, he was entitled to a share of the estate with the brothers and sisters of the full blood. Held, in the Court of Session, and affirmed in the House of Lords, that he was so entitled to claim.

David Bruce of Kinnaird, at his death, left issue by his first wife, a son, James Bruce, (who became the Abyssinian traveller), and William, Robert, Thomas, and two daughters, the appellants, Elizabeth and Margaret, by his second marriage.

William, the eldest of the second marriage, went to India, and having entered into the East India Company's service, attained the rank of Major, and acquired a fortune of £9000.

With the view of coming home to his native country, he had made various remittances to agents for his own behoof.

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In particular, he remitted in 1778 £1076. 5s. to London, but the person to whom it was remitted having died bankrupt, this sum was lost. Another remittance of £226. 11s. 1d. was made to a Mr. Conway in London, which was available for division. And £5708. 2s. 3d. Sterling was remitted to Mrs. Alexander and Messrs. Barclay and Low of Glasgow, with a power of attorney to those persons, and letters, directing them to lay out and invest the money at interest, on the best security, for his behoof, as they, or either of them, should think proper or expedient. The attorney is dated 24th Jan. The letter accompanying it bears the same date, and a subsequent letter of instructions bears 7th February.

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The bills for this sum, with the attorney and letters of instructions, were on shipboard, on their way to England, when Major Bruce died. They were drawn on the East India Company, and made payable at long dates *after sight*; but on arrival, and being presented, the Company refused to accept, unless four years were allowed for the two first, and five years for the other. This was done with the respondent's consent. The only other estate was that left in India at his death, administered to by his brother Robert, of which £1198. 17s. 10d. was remitted to Edinburgh, and £1000 more expected. The question then was as to the division of this personal estate between the brothers and sisters of the deceased. Whether it fell to be divided solely among the brothers and sisters of the second marriage (being of the full blood), according to the law of Scotland; or whether the respondent James Bruce, of the half blood, was entitled to any share, on the assumption that the deceased was domiciled in England, by the law of which, a brother *consanguinean* is entitled to share equally with brothers of the full blood.

He therefore brought an action against the surviving brothers and sisters, and also against the agents in Edinburgh and Glasgow, to whom these remittances were made, contending, that as the Major died by law, domiciled in England, where his effects were also situated at the time of his death, his estate fell to be divided according to the law of England, and concluding that, according to that law, he was entitled to a share with his other sisters and brothers. The defence stated to this action was, that the Major being a Scotsman, the law of Scotland must rule the division of his intestate succession, which excluded half blood.

The Lord Ordinary ordered memorials on the question, which the respondent stated to be simply :—Whether the law of England or the law of Scotland was to regulate the intestate succession of Major Bruce, a Scotsman, who died in India, domiciled there, and leaving his effects partly there and partly in England ?—The respondent contended that formerly, it had been a controversy, where an intestate dies domiciled in one country, but his effects in another, whether the succession was to follow the law of the domicile or the law of the place where the effects were situated ; but, in the present case, no such doubt could arise, as Major Bruce was domiciled in India at the time of his death ; part of his estate was there, and part in England, and consequently both the *forum domicilii* and the *lex loci rei sitæ* concur in supporting his claim.

The appellants, on the other hand, addmitted that the *lex loci rei sitæ* must govern as to that part of the estate still in India at the time of his death ; but, in reference to the £5708, remitted by the three bills, and which was then on shipboard on its way to this country, they maintained that it was divisible according to the law of Scotland, to which country it was destined to be invested in securities, and to which the deceased himself purposed to return.

The Lord Ordinary (Monboddo) pronounced this interlocutor.—“ Finds, 1. That Major Bruce was in the service
“ of the East India Company, and not in a regiment on the
“ British Establishment, which might have been in India
“ only occasionally, and as he was not upon his way to Scot-
“ land, nor had declared any fixed and settled intention to
“ return thither at any particular time, India must be con-
“ sidered as the place of his domicile. 2. That as all his ef-
“ fects were either in *India*, or in the hands of the East
“ India Company, or of others, his debtors in England,
“ though he had granted letters of attorney to some of his
“ friends in Scotland, empowering them to uplift those
“ debts, his *res sitæ* must be considered to be in England :
“ Therefore finds, That the English law must be the rule in
“ this case, for determining the succession of Major Bruce,
“ and consequently that James Bruce of Kinnaird is entitled
“ to succeed with the defenders, brothers and sisters, con-
“ sanguinean and decerns.” And, on reclaiming petition,
the Court adhered.

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July 1, 1788.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—Major Bruce's domicile was

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in Scotland. Domicile, in the legal sense, is a word of very different import from residence or habitation, because ambassadors, envoys, exiles, do not lose their domicile although they reside in a foreign country. Mere length of time or mere residence in a place, does not therefore *per se* constitute domicile. Three rules are invariable; 1. Every man has a domicile in his native country, until he acquires another; 2. That he can acquire another only by establishing himself there, *animo remanendi*; and, 3. That however long a party may reside abroad in certain capacities, still his domicile remains at home in his native country, to which he belongs, where he was born, and to which it is reasonable to presume he has always an intention of returning, although the time of doing so be undetermined.—Major Bruce was born in Scotland, and all Scotsmen abroad, who have no intention permanently to remain there, but who have a constant intention of returning to their native country, are domiciled Scotsmen; and it makes no difference in the intention, that the day or term of returning may not be fixed, because the intention of returning may be as positive in the one case as the other. Nor is it material to this intention, that Major Bruce was not a British officer, in the service of the Crown, because the East India Company is a British Company, incorporated by charter from the British Crown—the possessions in India are British—and as much a part of Scotland as England, the term “Britain” comprehending both countries. When a Briton enters into foreign service, such as French or Prussian, this presumes an abandonment of his country and his domicile; but the same cannot hold, where a Briton enters into the East India Company’s service, which is a British Company, and a British possession, under the allegiance and dominion of the British Crown. Major Bruce had expressed his intention of returning in the letters adduced, although the precise time was not fixed. He had, in furtherance of this intention, transmitted the £5780 to Scotland, which was the strongest evidence of his intention to return to his native country; and, by the law of Scotland, therefore, his estate fell to be distributed among his brothers and sisters of the full blood.

Pleaded for the Respondent.—1. By the various decisions of the Court of Session, it has been established, that the personal property of an intestate, must be distributed according to the law of the place in which such property is situated; and as the property of Major Bruce was part in India,

and the other part in England, at least must be so held, as being due to an intestate resident in India, and payable by a trading company resident in England, such property must be considered, in the eye of law, as situated either in England or India, and therefore distributable, in either case, according to the law of England. 2. The circumstances of the present case prove that Major Bruce was domiciled in a country subject to the laws of England, and therefore the respondent was entitled to participate in a share of the succession, whether the *lex domicilii*, or the *lex loci rei sitæ* is adopted as the rule of succession; because by the laws of England the half blood is entitled to a share along with the full blood.

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After hearing counsel,

LORD CHANCELLOR THURLOW stated :—

“ MY LORDS,

“ As I have no doubt that the decree ought to be affirmed, I would not have troubled your Lordships by delivering my reasons, had it not been pressed, with some anxiety, from the bar, that if there was to be an affirmance, the grounds of the determination should be stated, to prevent its being understood that the whole doctrine laid down by the interlocutor appealed from, and particularly that on which it was said the judges of the Court of Session proceeded, principally in this, and former cases similar to it, had the sanction of this House. It had been urged, that the judgment should contain a declaration of what was the law, and he had resolved in his own mind, whether that would be expedient. It was not usual in this House, or in the courts of law, to decide more than the very case before them; and he had particular reluctance to go further in the present case; because, as had been stated with great propriety by one of the respondent's counsel (Mr. Hope), various cases had been decided in Scotland, upon principles which, if this House were to condemn, a pretext might be afforded to disturb matters long at rest.

“ But I have no objection to declare what were the grounds of my own opinion, and how far it coincided with the rules laid down by the Court below.—Two reasons were assigned for having declared that the distribution of Major Bruce's personal estate ought to be according to the law of England; First, That India, a country subject to that law, was to be held as the place of his *domicilium*, and certain circumstances, from which that was inferred, were adduced. These he considered only as circumstances in the case; that is, though these had been wanting, the same conclusion might have been inferred from other circumstances. In his mind, the whole circumstances of Major Bruce's life led to the same conclusion.—The

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second reason assigned by the interlocutor was, that the property of the deceased, which was the subject of distribution, was, at the time of his death, in India or in England. As to this, he founded so little on it, that he professed he could not see how the property could be considered as in England; it consisted of debts owing to the deceased, or money in bills of exchange drawn on the India Company. Debts have *no situs*; they follow the person of the creditor; that proposition, therefore, in the interlocutor fails in fact.

“ But the true ground upon which the cause turned was, the deceased being domiciled in India. He was born in Scotland; but he had no property there. A person’s origin, in a question of, Where is his domicile? is to be reckoned as but one circumstance in evidence, which may aid other circumstances; but it is an erroneous proposition, that a person is to be held domiciled where he drew his first breath, without adding something more unequivocal. A person being at a place is *prima facie* evidence that he is domiciled at that place; and it lies on those who say otherwise to rebut that evidence. It may be rebutted, no doubt a person may be travelling;—on a visit; he may be there for a time, on account of health or business; a soldier may be ordered to Flanders, and may be detained for many months;—the case of ambassadors, &c.; and what will make a person’s domicile or home in contradistinction to these cases, must occur to every one. A British man settles as a merchant abroad;—he enjoys the privileges of the place—he may mean to return when he has made his fortune; but if he die in the interval, will it be maintained that he had his domicile at home? In this case, Major Bruce left Scotland in his early years; he went to India; returned to England, and remained there for two years, without so much as visiting Scotland, and then went to India, and lived there sixteen years, and died. He meant to return to his native country, it is said, and let it be granted: he then meant to change his domicile, but he died before actually changing it. These were the grounds of his opinion, though he would move a simple affirmance of the decree; but he would not hesitate, as from himself, to lay down for law generally, that personal property follows the person of the owner; and, in case of his decease, must go according to the law of the country where he had his domicile; for the actual *situs* of the goods has no influence. He observed, that some of the best writers in Scotland lay down this to be the law of that country, and he quoted Mr. Erskine’s Institute as directly in point. In one case, it was clearly so decided in the Court of Session; in the other cases, which had been relied on as favouring the doctrine of *lex loci rei sitæ*, he thought he saw ingredients which might make the Court, as in the present case, join both *domicilium* and *situs*. But, to say that the *lex loci rei sitæ* is to govern, though the *domicilium* of the deceased be without contradiction in a different country, is a gross mis-

application of the rules of the civil law, and *jus gentium*, though the law of Scotland on this point is asserted to be founded on them."

It was therefore ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *Sir J. Scott, W. Alexander.*

For Respondent, *Ilay Campbell, Chas. Hope, J. Campbell.*

NOTE: *Appellant's Authorities, (Scottish).*—Henderson's Children, Durie, fol. 88; Schaw v. Lewins, 1 Stair's Decisions, fol. 252; Brown and Duff v. Bizot, 1 Stair and Dirleton's Decisions, 29 July 1666; Brown v. Brown, Lord Kilkerran, *voce* Foreign, Falconer, 24th November 1744; Morrison and Others v. Earl of Sutherland, Lord Kilkerran *voce* Foreign, June 1749; Davidson v. Elcherson, Fac. Coll. 13th January 1778; M'Lean v. Henderson, *Eodem die*.

Foreign Authorities.—Vattel, a French Jurist, Liv. II. cap. 8, § 100.

Denisart, *voce* Domicile, § 3-4.

Civil Law.—Voet. Comment. ad Pandect, lib. 38, t. 17, § 34.

Vinnius, Quest. sel. lib. 2, c. 19.

Dutch Law.—Van Leuwen, Censura Forensis, lib. 3, 6, 12, § ult.

Huber. Prælectiones Juris Civilis et Hodierni, pars. 1, lib. 3, tit. 13, § 21; pars. 2, lib. 1, tit. 3, § 15.

English Authorities.—Thorne v. Watkins, 2 Vez. 35.—Kilpatrick v. Kilpatrick, Rolls, 27th July 1787; Burne v. Cole, 7th April 1763; 3 Haggard's Eccles. Rep. p. 462.

[Mor. p. 8769.]

SIR WM. FORBES, Bart., GEORGE SKENE }
and Others, Freeholders of the County } *Appellants;*
of Aberdeen,

SIR JOHN MACPHERSON, Bart., *Respondent.*

House of Lords, 19th April 1790.

ELECTION—VOTING—QUALIFICATION.—The Duke of Gordon granted a liferent superiority to Sir John Macpherson, then residing in India, and, under this title, his agents claimed to have him enrolled on the roll of freeholders. The statutory oath, devised to detect nominal and fictitious qualifications, was not put; but an objection was stated to his being put upon the roll, on the ground that his

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title was fictitious and nominal. The court of freeholders put him upon the roll. On complaint to the Court of Session, the appellants insisted that certain interrogatories, embodying the averments made in process, should be put to the respondent. Held, by the Court of Session, that it was incompetent to put such interrogatories. Reversed in the House of Lords; and held, that the statutory oath, which was not taken in this case, did not shut out all other, or further inquiry; and remit made, with order to ordain him to confess or deny the averments put on record in the appellants' pleadings.

In the month of October 1788, the respondent claimed to be enrolled as a freeholder in the county of Aberdeen, upon the following titles, viz. 1. Charter of resignation in favour of Alexander, Duke of Gordon, his heirs and assignees, of the lands, lordships, and others therein mentioned; comprehending, *inter alia*, the lands and barony of Touch, Cluny, and Midmar, of which the following lands are parts and pertinents, viz. all and whole the lands of Finlettrie, with the pertinents therein specified; as also the town and lands of Tellymair, Tellygownil, and Haybogs, with the mill, mill lands, and astricted multures of Tellymair, and whole pertinents of said lands, all lying within the parish of Touch, and sheriffdom of Aberdeen, which charter bears date the 7th August 1786. 2. Disposition by the said Alexander Duke of Gordon, of the lands and others before mentioned, in favour of the respondent in liferent, containing an assignation to the said charter, and precept of sasine therein contained, so far as respects the said lands and others above mentioned; which disposition is dated the 26th September 1786. 3. Instrument of sasine following upon the said charter and disposition, dated the 27th, and recorded in the particular register of sasines kept at Aberdeen the 29th of the said month of September 1788.

It was alleged by the appellants and other freeholders, that the Duke of Gordon was in the practice of manufacturing fictitious votes to a large extent, by granting qualifications to his numerous friends. Among others, he had granted the above qualification to Sir John M'Pherson, then Governor General at Bengal.

But to his claim to be enrolled as a freeholder the appellant George Skene stated the following objection:—"That the qualification therein described, upon which the said Sir John M'Pherson claims to be enrolled as a freeholder of this county, is nominal and fictitious, confidential, and

“ created for the sole purpose of enabling him to vote, and
 “ that in defiance of the statute of the 7 of George II., and
 “ of the other laws respecting the qualifications of freehold-
 “ ers entitled to vote in the election of members to serve in
 “ parliament for this county.”

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To this objection the respondents' agent made the following answer:—“ That the objection is without foundation, and arises merely from presumption; that the claimant is a real and true purchaser of the superiority, for a price actually paid; and therefore it would be doing an injustice to deprive him of the benefit of that purchase, as no objection has been or can be stated to his titles to be enrolled.”

The majority of the freeholders being satisfied with this answer, the respondent was admitted to the roll.

The appellants then complained against this judgment to the Court of Session, under the authority of the statutes; stating that *ex facie* of the transaction, it evidently appeared that it never was the object of these titles to convey to the respondent any real or substantial estate, or even to afford him an independent free qualification, and insisting that the respondent should answer certain interrogatories tending to expiscate the fictitious nature of his title and qualification; such as, That the conveyance of the lands contained in his title was made without his previous consent or knowledge, and that the expenses of these titles were borne by the Duke. That they were never delivered to the respondent before his enrolment, or at any time in his possession. And whether he considered himself bound in honour to vote for the Duke's candidate, and to renounce his freehold qualification at his Grace's pleasure.

The Court of Session pronounced this interlocutor:— Mar. 6, 1789.
 “ The Lords having advised this petition and complaint,
 “ with the answers thereto, replies and duplies; they find
 “ it incompetent to put the questions proposed by the complainers; repel also the objection of nominal and fictitious
 “ to the respondent's qualification, and therefore dismisses
 “ the complaint, assoilzie the respondent, and decerns.”

Against this judgment the present appeal was brought.

Pleaded for the Appellants.—When a great proprietor, whether peer or commoner, parcels out the superiority of his estate amongst a number of his confidential friends, for the avowed purpose of introducing them into the roll of freeholders, every one must see that he can have no object in view but to increase his own influence, or, in other words,

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his power of voting; it being the same thing whether he exercise the power by himself, or by others appointed by him. A system so obviously inconsistent with the constitution, which allows no vote to peers, and only one to commoners, however large their estates, can have no foundation in law.

By the original constitution of Scotland, all the immediate vassals of the crown were obliged, without distinction, to give attendance in parliament; but, in process of time, they became so numerous, and the estates of some of them were so small as to render it necessary to relax from the rigour of the ancient law.—Statutes, accordingly, passed in the reigns of James II. and James IV. of Scotland, dispensing with the attendance of those whose estates were under a certain extent; and at last, in 1587, a material alteration took place, by the introduction of representatives from each county: for the election of whom a statute passed in that year, and ordained:—“ That all the freeholders
“ of the king, under the degree of prelates and lords of
“ parliament, be warned by proclamation to be present at
“ the choosing of the said commissioners, and none to have
“ vote in their elections but such as have forty-shillings
“ land in free tennandry, holden of the king, and have
“ their actual dwelling and residence within the same shire.”

Some questions having arisen with regard to the right of voting, to prevent these for the time to come, it was enacted by the act 1661, cap. 35, “ That besides all heritors who
“ hold a forty-shilling land of the king’s majesty *in capite*;
“ that also all *heritors, liferenters*, and wadsetters, holding
“ of the king and others, who held their lands formerly of
“ the bishops and abbots, and now hold of the king, and
“ whose yearly rent doth amount to 10 chalders of victual,
“ or £1000, (all feu-duties being deducted), shall be, and
“ are capable to vote in the election of commissioners of
“ parliament, and to be elected commissioners to parliament,
“ excepting always from this act, all noblemen and their
“ vassals.”—The £1000 here mentioned is Scots money, that is, £83. 6s. 8d. sterling, and shows that a tolerable estate was then required to entitle a person to so important a privilege.

To discover whether an estate, on which a vote was claimed, yielded 10 chalders, or £1000 Scots of free rent, might often be attended with difficulty, and much time might be consumed in parliament by trying the merits of controverted elections. A statute was accordingly passed in 1681, which, after reciting the great delay in despatch of public affairs,

&c. enacted :—“ That none shall have vote in the election
 “ of commissioners for shires or stewartries, which have
 “ been in use to have been represented in parliament and
 “ conventions, but those who at that time shall be publicly
 “ infeft, in property or superiority, and in possession of
 “ forty-shilling land of old extent, holden of the king or
 “ prince, distinct from the feu-duties in feu lands, or where
 “ the said old extent appears not, shall be infeft in lands
 “ liable in public burdens for his Majesty’s supplies for
 “ £400 of valued rent, whether kirklands holden of the
 “ king, or other lands holding feu ward or blanch of his
 “ Majesty, as king or prince of Scotland. And that appris-
 “ ers and adjudgers shall have no votes in the said elections
 “ during the legal reversion, and that after the expiry there-
 “ of, the appriser or adjudger first infeft, shall only have a
 “ vote, and that no other appriser or adjudger coming in
 “ *pari passu*, till their shares be divided ; that the extent of
 “ the valuation thereof might appear, and that during the
 “ legal, the heritor having right to the reversion shall have
 “ vote. And likewise proper wadsetters, having lands of
 “ the holding, extent, or valuation foresaid, and that appa-
 “ rent heirs, being in possession by virtue of their predeces-
 “ sor’s infeftment, of the holding, extent, or valuation fore-
 “ said, and likewise liferenters, and husbands, for the free-
 “ holds of their wives, or having a right to the liferent by
 “ the courtesy, if the said liferenters claim their vote, other-
 “ wise the fiar shall have vote ; but both fiar and liferenter
 “ shall not have vote, unless they have distinct lands of the
 “ holding, extent, or valuation foresaid ; but that no person
 “ infeft for relief or payment of sums shall have vote, but
 “ the granters of the saids rights, their heirs or successors.”

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This statute appears to have been anxiously framed, to ex-
 clude every species of unsubstantial qualifications. It is
 true, indeed, that the right of voting, as formerly, was still
 confined to those who held their lands immediately of the
 crown ; and as liferenters were preferred to fiars, it has been
 maintained that a liferenter of a bare superiority, yielding
 him no earthly profit, is entitled to vote, both under the let-
 ter and under the spirit of this statute. It, however, had
 no such qualification in view. It was common in those days,
 and is so still, to create liferenters and fiars in family settle-
 ments : for instance, a father settling his estate upon occa-
 sion of his eldest son’s marriage, divests himself of the fee,
 by conveying to his son and the heirs of the marriage, with

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the burden of his own liferent, or, in other words, reserving to himself the enjoyment of the rents during his life. It is plain, in such a transaction, the father continues to have a very beneficial interest in the estate; and it is most just that the preferable right of voting should likewise continue with him. Such instances of real and substantial liferents were plainly what the act 1681 had in view; and not that sort of imaginary liferent of naked superiority, which the invention of modern times has raised up for the mere purpose of multiplying fictitious votes in defraud of the law.

On this footing matters rested until the Union, when, by an act passed in 1707, cap. 8, it was enacted:—"That none
 " shall be capable to elect, or be elected, to represent a shire
 " or burgh, in the parliament of Great Britain, for this part
 " of the united kingdom, except such as are now capable by
 " the laws of this kingdom to elect, or to be elected, as
 " commissioners for shires or burghs to the parliament of
 " Scotland."

No person had then conceived the idea of arrogating to himself more votes than one, by giving fraudulent qualifications to confidential friends, who were to vote according to his directions; but as soon as parliamentary interest became an object of great consequence, the ingenuity of lawyers contrived methods by which the law might be evaded. But, to do away with these, an act was passed, setting forth:—"That of late several conveyances of estates had been made
 " in trust, or redeemable for illusory sums, noways adequate to the true value of the lands, on purpose to create
 " and multiply votes in election of members to serve in
 " parliament for that part of Britain called Scotland, contrary to the true intent and meaning of the laws in that
 " behalf, and enacting, that it should be lawful to or for any
 " of the electors present, suspecting any person to have
 " his estate in trust for behoof of another, to require the
 " following oath from him," (here follows the form of oath).

Still, in process of time, new devices were framed to evade the law, as the practice of creating false votes still continued, which led to a new form of oath; declaring "That his title
 " was not nominal or fictitious, created in him, in order to
 " enable him to vote for a member to serve in parliament,
 " but that it is a true and real estate in him, for his own use
 " and benefit, *and for the use of no other person whatever.*"

The respondent's title and qualification, it is maintained,

is one of those struck at by the above enactments ; and being nominal and fictitious, ought to be annulled and set aside. 1790.

Pleaded for the Respondent.—In reference to the act 1681, which gave the privilege of voting to wadsetters and liferenters, no subsequent act appears to have taken away that right so conferred. But, since that time, two acts of material consequence to the present cause have been passed, relative to the qualification of freeholders. These are, the act 12th Anne, and the 7 of George II., the sole object of which was, to prevent persons voting who had not really in them that estate which, from their title-deeds they seem to possess, but it was not the intention of these statutes to prevent wadsetters or liferenters from voting.

As the whole system of law relative to the election of members of parliament is entirely statutory, and depends principally upon the statutes which have already been mentioned, so it is apprehended that judges, in determining any question arising out of that system, are to be directed solely by the enactments of the statutes ; they are merely interpreters of the acts of parliament, and have no right to do more than obey the injunctions, and give effect to the particular regulations contained in those acts, from which alone their power of determining as to the qualification is derived. Now, the statutes of Queen Anne and George II., while they were intended to prevent persons from voting, who had not really in them those estates upon which they claimed that right, and to detect latent and implied trusts, of which nothing appeared from the title-deeds ; so the statutes pointed out and specified the way and manner in which this investigation was to be made, and ordained every person who claimed the right of voting, to take, when required, certain oaths, which the legislature introduced, as the only means of detecting whether or not a person who, from his title-deeds appeared to be an unexceptionable voter, was truly so : and whether his estate was a true and real estate in him, or only nominal and fictitious.

The legislature having therefore clearly enacted, that, where a freeholder's title-deeds are fair and unexceptionable, and where he takes the oath introduced by the act George II., well known by the name of the Trust Oath, he is entitled to vote for a member of parliament, upon what authority can a court of justice introduce a different examination and mode of investigation from that introduced by law ? The act of parliament has said, that a freeholder, taking the oath

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1790. above mentioned, at the request of any other freeholder, shall be enrolled as absolute proprietor of the estate in right of which he claims to be enrolled : upon what ground shall any court of justice say, that notwithstanding a person's having taken that oath, he shall undergo another, and a very different examination, as to the very matter which it is the object of the trust oath to clear up and ascertain ? The act of parliament says, that where a person is enrolled, and shall refuse to take the trust oath, his vote shall be held nominal and fictitious, and he shall be erased from the roll ; upon what ground then can any freeholder's name be erased from the roll, upon the idea that his vote is nominal and fictitious, without his having refused to take that oath, upon his taking which the legislature has declared that his qualification is no longer subject to the objection of nominal and fictitious ?

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And this proposition, that the trust oath is the only criterion to discover what votes are nominal and fictitious, does not rest upon the idea that a person who has once been examined cannot be examined again. The respondent has no occasion to resort to this principle. It is because the legislature has prescribed a particular mode for detecting fictitious votes, and has declared, that this mode being followed, is sufficient, and must therefore supercede all others.

After hearing counsel,

LORD CHANCELLOR THURLOW :

“ MY LORDS,

“ I doubt not this question has created a considerable degree of anxiety with regard to the particular interests to which the consequences of the determination apply. I have the good fortune to stand in a situation perfectly clear of all that anxiety :—having myself no property nor interest whatsoever in that part of the country. The few wishes I could possibly entertain upon the subject, happen by accident to concur with those who wish to sustain the law of Scotland, and, if that could operate anything, it would certainly go to support it ; but, my Lords, it operates so little, as to affect in no degree the opinion I entertain. It is likewise true, I do not feel this to be a subject of importance enough to inflame the zeal of any person to act upon the occasion, because from the lapse of time and accidents, a constitution has fallen so far off its true basis, that instead of a representation made by the real and effectual landed property of the country, it is come to be made, or capable to be made, by that which is almost less than a shadow. It is too late

to entertain zeal upon such subjects as those. The single question therefore is, what is the law of Scotland upon the point ?

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“ Upon the other hand, my Lords, if it can be proved, what is contended for at the bar, that the law of Scotland, in regard to the right of voting, is not only in some places, but over the whole of that country, of the nature of burgage tenure, and if that country ought to be represented by such means as Old Sarum is represented. If that can be maintained, it is not your Lordships’ duty,—it is not within the compass of your province, to say that all Scotland shall not be represented as Old Sarum is represented ; but, on the contrary, it is your business to deduce that to be the true representation of all the landed property in Scotland, if such be really the law of the place.

“ With respect to another part of the case, I think the question now under your Lordships’ discussion, does not run upon the very same points, with those cases that have been so often quoted and pressed upon your Lordships as settled decisions of this House ; because, though I am ready to declare that I do not feel the same degree of concurrence with those decisions which I have been sensible of in most of the other decisions which your Lordships have come to, upon the consideration of the high authority of the great and eminent person who certainly advised those judgments ; yet I should certainly have been much disinclined to have gone upon a contrary principle, and, consequently, to have established a contrary rule of decision to what was adopted in this House, when these cases originally began. I don’t mean to say, that if that question were to come again before the House, I should look upon it to have been so decided as to make it unfit for your Lordships to renew the consideration of the whole subject.

“ It is true, where a matter is decided in the last resort, and all the arguments maintained on that subject, apply to it with a great deal of force, it becomes a matter of much delicacy, and it becomes a matter of great importance, for your Lordships to consider before you will reverse such a judgment as that. But it is impossible for your Lordships to lay it down as a rule, that where a judgment is given, even in the last resort, it will avowedly and expressly change the law. It will bind the law in that particular case irrevocably ; but it will not make law in other cases, or between other parties ; with regard to him it is *res inter alias acta* ; for there is no rule of law founded upon a proposition so absurd as this, namely, That even in the last resort there is an absolute infallibility, so as to render it a judgment conclusive, not only as to the question before decided, but as to the rule of law in all other cases. For example, if by an accident, too strange to be foreseen or imagined, it should ever occur to decide that an estate to a man and his heirs, did not make a fee simple, it would be absolutely necessary for your Lordships, the next time that proposition was stated in the House, to revise the ground

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of that judgment, though in a particular case which might be proposed, an estate to a man and his heirs, would not make a fee simple, nor could be enjoyed but according to the particular right of either party in the case.

“ I shall only farther say, on this subject, that I lament exceedingly that which I have read of the opinions of the judges of the Court of Session upon this case. It is certainly enough to make one grave, when fifteen learned senators followed each other in lamenting that there had been such decisions given and pronounced contrary to the statute law of the land, and yet consider themselves as bound by those decisions. I go no farther upon that, because I, in point of fact, on the present occasion, hold the present decision is not quite so correct as, according to my poor apprehension of the thing, I really think it might have been ; because to this particular case the former judgments do not apply ; and therefore the question being to be determined upon grounds that lay clear of those decisions, it will fall to be determined of course upon those which are the clear grounds of the law of Scotland.

“ My Lords, upon that law I shall say but a word upon the jurisdiction of the Court of Session, because your Lordships know, from the history which has been given at your Bar, (and you are familiar with the books themselves), that great pains have been taken in order to prevent the uncertainty which must have arisen in decisions of the House of Commons, and it has been considered one of the greatest advantages that country could boast of, that their rights of election were liable to be made clear, up to the very point of its conclusion, by an examination judicially taken, and before the court of justice of that country. Such was the constitution of Scotland, and therefore the present question will turn upon this : —What is the law of Scotland with regard to the rights of election ?

“ My Lords, some pains have been taken to introduce an analogy between the rights of election and burgage tenure. I do not think it necessary to enter into it, for several reasons, though it was argued at the Bar. First, if they are exact in saying it, and I could form an opinion, that supposing it to be the law of burgage tenure, it was wrong. I don't sit here upon the terms of having my opinion controlled, unless it be by the clear rules and principles of law, or a long authoritative course of decisions. I imagine there are but few antiquarians who would not say burgage tenure is a right of election in a borough, in the hands of those who held the borough tenements, which tenements paid back to the lord that peculiar species of rent called a burgage rent. The consequence of finding it in that manner would be ; first, all the tenants that paid that rent would be capable of voting. Secondly, any tenant in the borough that did not hold the complete tenement, and was not liable to the lord, had not the whole of the burgage tenement, and would not have a title to vote. But, thirdly, I suppose an antiquarian would say, anciently

that those who held the lands, and those only who did hold the lands, would have the right to vote.

“ In process of time, it has come in point of reputation, in the general opinion at least, to be the settled notion, that no objection can be made to those votes on account of multiplying them, or upon the account of occasionality. With regard to multiplying—it is certainly true each tenement cannot be divided ; so in that respect the votes cannot be multiplied beyond what they might have been at any prior time. With regard to occasionality, that is not the question that obtains here : for we are not now upon the subject of occasionality—it is a mistake to suppose *that*.—We are now upon the question, whether occasional or otherwise, a real substantial *bona fide* estate has been gained by the person pretended to be put upon the roll ? And occasionality is only a circumstance of evidence to show that the estate which stands well upon parchment is yet not sound at the bottom, and that he has not a right to vote. My Lords, I need not trouble your Lordships with stating, it is no part of the law of Scotland, that a man shall have as many votes as the extent and value of his property would go to, if divided. That any individual may come to the next Michaelmas Court of freeholders, and insist upon being put upon the roll for five or ten houses, or any other given number, because his property is of such extent, that if it were divided into five or ten, ergo, five or ten would vote. That is certainly not contended on any hand. Therefore all that is said upon the pretence of Lords or Commons,—men of great fortune in that country—having great weight in the representation, falls to the ground. It is clear then that the policy of the law of Scotland does not mean to give to any man, let his fortune be what it will, more than one vote.

“ That being the settled point, the single question is, whether Sir John Macpherson, the person here in question, has one vote ? How is that to be tried ?

“ The earliest law alluded to, as material to the present question, is the statute of 1681. That statute is understood to have no new law on the subject of qualification, but only defines what was the real estate in land that should entitle a person to vote:—namely, being publicly infeft in property or superiority—which was a circumstance in evidence to show his title to the land *bona fide*. I do not go upon the words respecting the smaller estates,—they are only articles of evidence, but being publicly infeft and actually in possession,—the question is then—‘ What is the true meaning of those words, being *really* and *actually* in possession ?’ My Lords, if nothing more depended upon it than only to satisfy the unbiassed judgment of any individual in explaining “ what being actually in possession means,” one would think the common language we hear so commonly used at the bar, as applied to those oaths called the *trust* and *possession* oaths, would be pretty nearly sufficient to show what the real idea

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of the country is, as to being possessed ; all the terms contained in those oaths were the ingredients to prove, whether the persons are or are not in actual possession ; but, without referring to the calculation that has been made, or appears to be made, by those that thought upon this subject, let us keep a little closer to the acts of parliament themselves.

“ After 1681, the next act is the 12th of Queen Anne, which recites, that often persons got into the apparent possession of lands, either in *trusts* or *redeemable* for illusory sums, no ways adequate to the true value of the lands, to create and multiply votes contrary to the true intent and meaning of the former acts ; and then it proceeds to provide, only that they shall be infeft a certain time before they shall be at liberty to act for their own accord, but they shall also take an oath to the effect mentioned in that act of parliament ; and it is upon this latter that the principal part of the dispute arises. It is worth attending to this act of parliament, with a view to consider how that dispute has been managed.

“ On the one side, it has been contended, that if the person will swear he is not within such and such circumstances stated in the oath, proving the tenure of the estate to be what is there represented, then he shall have a right to vote ; but that you shall prove that he is in those circumstances, only by his refusal to take the oaths, and in no other way whatever. And your Lordships have been told very seriously that this is the most beneficial, and the most effectual manner of preventing those frauds ; because, by driving them to swear in that manner, there is no doubt in the world you purge them in the most efficient way possible. There can be no better way of construing the act of parliament than through that medium. If you suppose the oath accumulative, there is no doubt in the world. It is additional to those securities that existed before, and will exist after the oath is given. The oath does tend, in a certain degree, to purge the roll of those that ought not to be upon it. But if you suppose it a commutation, that is, instead of being at liberty to proceed against them any other way, you shall have the benefit of examining them upon oath, there cannot be a worse bargain made in the world. In that manner, all those who are content to take an oath of this sort, though false, shall be admitted upon this roll ; and those who scruple to take a false oath shall be rejected. Another objection is made upon the statute of Anne, that all those who take the trust oath shall be competent. Your Lordships will recollect, this statute relates to elections only, and notwithstanding such oath taken, it declares that other objections may be made as to the right of persons to be elected or to elect ; and therefore to fancy any other ground can possibly be made, is wrong, when it does not come within the view or object of this statute in any view whatever.

“ The act of the 7th of Geo. II. has done no more than alter the form of that oath ; and nothing occurs to me to observe upon the al-

teration of the form of the oath of the 7th of Geo. II. except this, that they are obliged to swear they have given no promise, obligation, bond, back bond, or other security whatsoever, except what appears upon the face of the instrument itself. Now how can it be inferred that he has given no promise, obligation, deed, back bond, or other security, except those which appear upon the face of the instrument itself, when there is in the engagement, indorsed upon the back of the instrument of conveyance, a simple promise to reconvey, the oath might be well taken in regard to it; but will any body argue, if there were such a simple promise to reconvey indorsed upon it, it would not be an objection to the oath?—the form of the oath proves this. If the objection appeared from the indorsement upon the instrument, and they do not call upon you to swear, it is the fault of those who ought to impeach the title, that they do not take notice of it; but in regard to such objections which do not appear upon the instrument itself, you shall be called upon to take your oath.

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“ The whole of this argument, according to my poor judgment, has gone into a vast deal of confusion, for want of observing what the oath applies to, and what it does not apply to.

“ This is a question upon the title of Sir John Macpherson to be admitted upon the roll.

“ I observed it was so stated at the bar. Some noble Lords observed he was the claimant. Yes he was; and it is easy to see if there happened to be a majority of the people of the same description as himself, he would be admitted on the roll. No doubt the law was calculated to redress that mischief, by applying to the Court of Session and demonstrating to them that he ought not to be put upon the roll. So your Lordships are determining the question exactly in the same form as if he had not been put upon the roll.

“ Now, let us see a little what the policy of the law of Scotland, as it stands upon these acts of parliament, is, with regard to this subject. In the year 1681, it was provided, there should be a roll of freeholders made up, not only at the election of members of parliament, but at each of the Michaelmas courts, to provide against such partialities as these political assemblies were too much liable to in their own natures, and to prevent the judgment resting even upon the parliament of Scotland. I dare say they were liable to the same sort of abuse and complaints as the parliament of England in subsequent times. But the policy of the act was to give to the freeholders, the original right of deciding upon the titles of those who were to vote at the Michaelmas head court at the time, and it was provided by that act, that unless an objection was made at the time, no objection should be made afterwards, and as far as the election was thought of at the time, it was meant to make the parliament a court of appeal. The freeholders were first to determine, and the parliament afterwards; so it stood for a considerable time.

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It has been supposed that from the year 1681 to 1743 (the date of the statute 16th of Geo. II.) if the freeholders had put an improper person upon the roll, without an objection stated against him at the time, there was no way of correcting that abuse. With submission to that opinion, I doubt it. I hold that the general jurisdiction of the Court of Session would have enabled them, not in a summary way, as provided by the 16th Geo. II.; but it would have enabled them, in the ordinary course of their jurisdiction, to have reformed such abuse. I take it to have been determined in regard to boroughs where relief has been got from the ordinary jurisdiction of the Court of Session. But the 16th Geo. II. gives a summary jurisdiction upon this subject. How does the summary jurisdiction apply? Not to the right of election. The Court of Session has no summary jurisdiction as to that, nor ever had. I do not say, never had; for the act of 1681 gave it expressly. But from the time of the Union to the 16th Geo. II., the Court of Session never had a summary jurisdiction to try the right of election. That must and could have been tried by the House of Commons only. The 16th of Geo. II. has been thought by some to have intended vesting the whole of the jurisdiction in the Court of Session;—and I confess for myself, I find it a very difficult matter to invent, or state a case, where the House of Commons can properly interpose, at least with regard to a person's title to be on the roll. But why do I entertain that difficulty? because, if that statute of the 16th Geo. II. gave the Court of Session an authority over the roll, in all the extent of making up that roll, I find it a difficult matter to suppose a point of objection that does not come within the range of that authority.

“ I have always heard learned persons from Scotland, whom I have conversed with upon the subject, speak with some degree of horror of the House of Commons interposing; and I always thought they looked upon themselves as secure upon the idea the House of Commons would not do it;—but still, in respect to this argument, it makes little, for this is a question, not upon the right of voting at elections, but upon the right of standing upon the roll.

“ Now, let us consider how the oath provided by the statute of Queen Anne could possibly apply to this case. And I refer myself to that oath chiefly for the purpose of showing it has absolutely nothing to do with the subject matter of the present dispute,—that is,—whether a man should stand upon the roll or not; for, as the oath of the 12th Anne was, it could not have been put to him, but at the election of members to serve in parliament. He was at liberty to stand upon the roll at that time, and therefore to vote for others standing upon the roll; and he could have gone on for seven years together, adjusting the roll from Michaelmas to Michaelmas according to his own judgment, and there was no way of putting the oath to him. Thus it stood till the 7th of Geo. II., twenty years thereafter. If it be clear the oath administered in virtue of the 12th of

Queen Anne had no relation to standing upon the roll, and merely to the right of election upon that oath so taken, how was it possible the parliament at the time thought, that the oath so to be taken upon the occasion could possibly afford the least degree of security to the interest of the freeholders, that they should not have persons put upon the roll to depreciate their votes? A number of good votes came, and a number of bad votes of little value,—if they do not concur to depreciate them, how could they suppose or conceive an oath so inapplicable could produce the least effect to that end? What then can be made of that oath? It was said on one side, it was the intention of the legislature, a man should be bound to swear to that effect, but that the contents of the oath were totally immaterial to any other purpose; so that, if the facts were ever so clear that that oath was false in all respects and purposes whatever, yet it was intended by the act, if a man would swear at the election of members of parliament, he had not that fictitious sort of estate, he was entitled to stand upon the roll, to all other effects, and to all other conclusions whatever; and the parliament really hoped to purge the roll by this means. What signifies coming upon the roll? You can only vote for the preses, and for the persons eligible to serve in parliament, to stand upon the roll. The rest of the foundation will break down under you, and you will be obliged to take this oath. If you refuse, what is the effect? If under the statute of Anne he could not vote, yet he might by the statute of Anne remain upon the roll, and if, after the election of members of parliament, twenty others had been put upon the roll, he would have had a voice in putting them upon the roll. The counsel therefore shift their ground to the 7th Geo. II. It is impossible to shift their ground—they cannot, for that act contains no new enactment. It is merely a correction of the statute of the 12th of Queen Anne. It is impossible to argue that there is any intention upon the corrected oath of the 7th Geo. II. which is not applicable to the 12th of Queen Anne. But, if it were so, it would vary it in a degree; but in principle it would not vary it at all, for even as it stands upon the oath of the 7th Geo. II. this consequence follows, that if a man refuses to take the oath, either at the Michaelmas meeting, (formerly it was not there, but at an adjournment of the roll, but it is applied to the Michaelmas meeting) or the election of members of parliament, he is to be struck off the roll. I do not know why he should be so, if their construction of the 12th of Anne is right. I do not know why he should, after the act was mended in the 7th Geo II., be struck off the roll of freeholders. So the law stands in other respects even now. If a man can be enrolled in conscience; it is not true, if a man comes in person to be enrolled, he cannot have the oath put to him,—there is not such a circumstance in the whole act. But he must be upon the roll before he can have the oath given him. There was a case determined in this House, and so the law is understood to stand

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by the 10th section of the 16th of Geo. II. that those oaths which are to be given before the election of a preses, do not extend to the qualification oath, but only to the oaths of government. Upon that, it has been determined, where a man was enrolled, and where a man, upon the postponing before the rest of the business was done, went away to avoid taking the oath, the Court of Session struck him off the roll; this Court, upon his application, reversed it. They held his going away, was not a refusal to take the oath, and therefore he had a right to stand upon the roll. It is therefore a clear proposition, that he may vote for the preses and clerk of the preses; the preses, if we are rightly told, has a double voice; thus the election may be carried by the voice of one to whom this oath cannot be put.

“ I do think the decision of the present question, does not signify an iota; for, from what I am told of Sir John Macpherson, and the character he has held, and from the character he holds in the world, that he will not take such an oath, I believe no more than I shall take it myself. But it is of importance to the question, that a man in that situation might stand upon the roll, and produce the effect now mentioned. At the sametime, the circumstance of his being capable to produce such effect as that of inconvenience, which manifestly results from the effects so produced, are not the grounds of my argument. I only use them as illustrating: that is, as tending to show that neither the one nor the other of those oaths related to the right of individuals to be put upon the roll. They relate to a different subject, and ought not to be confounded with that. If you take that to be clear, what does it amount to? No more than this; a question, whether an oath to be taken, in order to exercise one out of many franchises that belong to a freeholder, and an oath by which he may exercise many franchises, and takes it to exercise one out of many, whether that oath was intended by the legislature to give him, from the possibility of that being put to him, (whether put or no is the same thing), a complete title to exercise all other franchises whatsoever; including those to which the oath did not relate. Taking it in that way, seems to be a proposition monstrous and untenable. Let us see what is the question in this particular case? Sir John Macpherson's agents, in his absence, tendered his papers, which seemed to be tolerably fair, a circumstance that made the freeholders a good deal astonished, and they hesitated. But the majority of the freeholders not being people in general, of a description to be much astonished, or have any hesitation upon such points as these, agreed to enroll him. Then a process is brought, under the 16th of Geo. II., complaining they had done wrong; for notwithstanding what appeared upon the face of the titles, yet he had no real substantial right, but merely a nominal and fictitious one, and he ought to be rejected. A great deal of argument was used at the Bar to say, that they think the words nominal and fictitious were not founded in fact. Nominal and fictitious is the definition by which I call it, because he cannot be fairly the

man he is described, and the counsel who said so, did himself define it in the next sentence, very nearly, by *aliud agit, aliud simulat*. He produces titles which, on their face, import to carry an estate; but he has obtained them under circumstances which, if disclosed, would show that nothing like such a conveyance was in the contemplation of the granter or grantee.

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“ The next step in the course of pleading, is to call on the other side to confess or deny what would go, some way or other, to establish the fact. My Lords, after what we have heard at the Bar, it is material we should be apprized what this kind of proceeding means. The learned gentleman who appears for the respondent, and whose knowledge in that law has been very useful on many occasions to the House, has told you expressly, that this is the usual course of pleading in the Court of Session. If a man is called upon to confess or deny, he is bound to do so; if he confesses, the fact must be taken to be true; but whether that fact is conclusive, is a different matter. If you call upon a man to confess circumstances, and if the circumstances do not conclude, the consequence is, to avoid the confession. It does not, on the other hand, preclude the other party from giving additional evidence, which may obtain judgment another way; but if neither the thing confessed, nor the additional evidence, creates a case which, in the opinion of the Court, does not bind it, there must be a judgment of *absolvitor*. The question being put in this manner, the Court takes it up, and pronounces a judgment of *absolvitor*, upon its being proposed that the defendant should plead in this manner. The Court of Session have taken it into their heads, that some judgment in the House of Lords prevented them. From what?—not only from putting the trust oath, but from putting the oath of verity. That oath is a contract between two parties in a suit, where one party says, I waive all other proof, and refer it to you, my adversary, whether such facts are true. He may do so; but he cannot afterwards produce a witness to the same point the party has been examined to. He is obliged to abide by it upon those points. It is a contract between the parties. I see some doubt, if the oath of trust has actually been put, and is to be considered as an oath of verity, Whether other evidence can be resorted to? and upon that the House seems to have gone in the cases alluded to. But the very argument proves that the House had no idea that the matter could not be examined by other means. What a monstrous proposition was laid down by the Bar, That if a man were to have his back bond produced to him, and it was proved he made a contract to give up the estate, yet the legislature means to say, that if he was bold enough to perjure himself, he should be entitled to the franchise *eo nomine* as perjured. It is impossible to state it in any other manner. And the Court of Session cannot interfere, and the person must not only remain upon the roll to all eternity, if he will venture to swear contrary to every proof that ex-

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isted in the world, even contrary to what may appear on the face of the instrument he produces. If the Court of Session can by any other means than putting the oath of verity and reference, discover the fraud, your Lordships' judgment is so far from damaging their jurisdiction and authority, as by the argument is supposed, that the judgment itself tacitly affirms the former judgments, and declares that the Court of Session ought to go upon all other points ; therefore the question here certainly does not arise upon that peculiarity, whether they are at liberty, like parties in ordinary suits, to put it by reference to the oath of the party. The Court of Session were extremely mistaken if they supposed your Lordships meant more than was said. I do not believe any noble lord at that time would have said, the Court of Session must not meddle with it at all. The inquiry is thrown upon them by the act of 16 Geo. II. Their jurisdiction is not to be doubted, but could not be given merely to see whether the estate was good *ex facie* of the title deeds. They must hear every pertinent complaint against the title. Then why not demur to it ? The allegation would state of course that they were to produce certain deeds, purporting to be the conveyance of a life estate in a superiority, which, for the information of those lords that do not know the subject so well as others, I will inform them at once what it is. It is a life estate in a " Baubee," or it may be the 24th part of a penny, in an estate that pays at the rate of £400 a-year rent; and a man sells that estate, and by sub-infeudation gives the whole valuable part of that estate to another, and reserves sixpence rent upon the sub-infeudation, and he converts that into as many parts as there is language in Scotland for small money ; and they have all good votes. That is, My Lords, the constitution of Scotland.

" Now, it is insisted that if a freeholder comes to the Court of Session, and states that he has that form of conveyance, which bears upon the face of it to be an investiture of the estate, but, in point of fact, which really gives no sort of substantial title to it, the Court of Session shall not inquire into it. Then the best thing is not to let them go on turmoiling in that way, and saying, by way of exception, there is nothing relevant in the charge. The best way would be, not to suffer such to be made at all. These are conclusions so plain, that I do not think myself much at liberty to go into argument upon it. Upon the other side, they have gone into arguments to prove, by a contrary doctrine, that fair votes may thus be cut down, if the Court of Session are to decide upon their ideas of honorary engagements, and things of that sort. I do not mean by honorary, the engagements which gratitude or the force of obligation compels a man to think himself bound to perform ; for such obligations draw him to exercise a judgment upon the subject ; but I mean that a fair qualification should be something paramount to leaving in the hands of the granter, the disposal of that very subject which *prima facie* he appears to have parted with.

"Then they object to the last question. Don't you think yourself in honour bound, &c.? I do not think that question should be put, whether the transaction be collusive or not. It is like the falling of a star in my mind. But collusive or not, he has a right to call upon him, to relieve him from the thing. If the questions or answers be material, then he must proceed; but if not material, the defendant cannot be hurt; but at this stage I cannot say that it is totally immaterial, because what a man thinks in his own mind, may be a mere sensation, and amount to nothing. But if that impression upon his mind, arises out of the rest of the transaction, it extends itself to the granter, and may show what was the consideration of the grant. If it passed from the mind of the granter to the grantee, and from the mind of the grantee to the granter, (I do not ask what you mean, or whether it is in writing or in words,) but if in fact, there existed such a promise to reconvey, it comes within the very words of the act of parliament, whether the questions here proposed, be sufficient or not sufficient questions—upon those points I do not stop to enquire. When you talk of an estate given to a son, or to a brother, and purchased for a valuable consideration, in a place where nothing but 8 or 10 votes decide the election in a borough, I understand that at once: and because a man thinks fit to have an interest in such an election as that, and to give a solid sum of money, (and seats in parliament may amount to no inconsiderable part of an estate,) and upon the eve of an election, when he is desired to vote for a particular candidate, he says no, I have nothing to do with you my granter, I never meant to vote for whomsoever you may mean to put up. It may be said, or hinted, that it was expected he should, and that the qualification was granted upon that expectation, but it may be refused. If Sir John Macpherson was told it was out of the great personal kindness the Duke of Gordon had for him, that he made him a present of this right to vote, it would be thoroughly understood between them, and by any gentleman that hears me. If a vote of that sort were offered him, and he had no disinclination to be the servant of the noble Lord, he would ask no questions, but take his vote, and poll, and go on; but if he dislikes it, he would say: 'Let me understand how this is; whether really there has been that sort of heartiness and kindness which I did not know of. I did not know you were so kind as give me the vote; but if there is the least degree of understanding that I am to vote for any kind of character you may put up at the next election, from my notion of honour with regard to you, I will not take it.' I do not think a vote of this kind can pass from one gentleman to another without its being well understood. Sometimes it may be understood from circumstances. I should think it would be better if it was a little more explicitly understood in general. What does it amount to? If it is out of the reach of all possible enquiry, there let it lie. If you will not let it so lie,—as many proofs as I can get I will get; and what I cannot get at I will not

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decide upon ; but I will go as far as I can. Therefore do not entertain an idea, that I have a notion that the way prescribed may not be in accordance with the law of Scotland ; and if what I decide is the law of Scotland, it must stand till somebody thinks proper to alter it. And as to the question, whether the principle of it fail, I am very far from being one of those who examine into the principles for the sake of overturning the constitution of any place ; much less of a country that has flourished for so many ages, and has risen to that height of greatness and prosperity under that constitution. I should take him to be a bold man that would undertake, upon any abstract proposition whatever, to new model the constitution of a country under such principles as these, unless he can state that these principles are false. I give no opinion upon that subject. The humble advice I propose, goes upon as perfect a conviction as any solid reason can establish, that I am speaking the law of Scotland, and not from any private zeal, or public wishes, or any private objects upon that subject. In consequence of which, I move your Lordships to reverse the interlocutor, and to declare that the defendant shall confess or deny the truth of the several matters contained in the averments."

It was ordered and adjudged, that the interlocutor complained of be reversed ; and it is further ordered, that the respondent do confess or deny the averments in the appellants' pleadings.

For Appellants, *Tho. Erskine, Alex. Wight.*

For Respondent, *Sir J. Scott, Wm. Tait.*

WILLIAM WADDEL of Easter Moffat, universal dispo- nee of WM. WADDEL of Calderhead.	} <i>Appellant ;</i>
ELIZABETH, AGNES & ANN WADDELS, Sisters of the Deceased HENRY WADDEL,	
	} <i>Respondents.</i>

House of Lords, 20th Dec. 1790.

PROOF—EVIDENCE—BORROWED MONEY.—A party held no vouchers or documents of debt, for sums of money lent to his brother. The only evidence of these being some jottings in the brother's account book, and other separate accounts.—Held, that these were not sufficient evidence to support the claim made after the death of both.

This was an action raised by the appellant, against the

respondents, representatives and executors of the deceased Henry Waddel, for the sum of £3438. 17s. with the legal interest thereof, &c., conform to the deceased Henry Waddel's account books, pocket books, and other writings, which belonged to the said deceased Henry Waddel, all in the possession of the respondents.

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It was stated that William Waddel had been in the practice of lending large sums of money to his brother Henry, without taking any voucher or document of debt for them. In return, Henry was to pay 4 per cent. interest; but it was alleged that Henry lent out this money along with his own, and made it yield 5 per cent. At the close of the year 1773 an account was exhibited, in the handwriting of Henry, showing a balance due William Waddel of £784. 4s. 1d., and between that time and 1782, Henry had received other sums amounting to £1222. 10s. 10d.

But such being the unbounded confidence placed by William in his brother Henry, no voucher or acknowledgment was taken by him for these sums. William even executed a settlement in his favour, which was destroyed before his death, and one executed in favour of the appellant, his nephew, and son of George Waddel of Easter Moffat, the elder brother of William and Henry.

On a special call to that effect, the Lord Ordinary order- Dec. 4, 1784.
ed "the defenders to exhibit and produce in this process
"the whole writings, account books, and jottings libelled on
"and called for by the pursuer."

After the record was made up and closed upon these productions, the Lord Ordinary pronounced this interlocutor:—"Finds that the jottings and accounts founded on Dec. 23, 1786.
"by the pursuer, do not afford any evidence that *Henry*
" Waddel was, at the time of his death, indebted to his
" brother; therefore assoilzies the defenders, and decerns."

The appellant lodged a representation against this interlocutor, and insisted that the commissary clerk of Glasgow should be ordained to transmit a trunk belonging to the deceased Henry Waddel, containing, in particular, a made up account of sums received from William Waddel, and other papers. The Lord Ordinary granted this request "for July 23, 1786.
"recovering the account said to have been made up by the
"late William Waddel."

Upon these, it was contended for the appellant, that though he was not possessed of any documents signed by Henry Waddel, yet his claim was supported by the most

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unexceptionable evidence, the written acknowledgments of Henry himself, found after his death, locked up in his repositories. There were produced two books kept by Henry Waddel; the one a receipt book, in a part of which he entered the interest of the money lent out by him as it was received, and the principal sums when paid, generally mentioning the uses to which these last were applied; and in another part of the book he entered the receipt of his rents. The other book was an account book, the only ledger Henry kept, in which he opened accounts with his clients. In this last book there was an account opened with his brother *William*, commencing 2d July 1755, ending 1759, and discharged thus: "28th Nov. 1759, Received from Wm. Waddel of Pepperhills £12. 1s. 6d. in full of all demands I can charge him on any account."

There was next engrossed in this book several sums marked "borrowed from you," between 31st July 1760 and "4th August 1761, amounting to £250.

These entries in Henry's book were deleted by scorings drawn through them.

The next account opened for William Waddel, had the words "borrowed from you," and in it the several sums lent from 26th Nov. 1764 to 8th June 1782, amounting to £2056. 10s. 3d, were respectively stated.

There was also the account on separate paper, which brought out the balance, after deductions, of £784. 4s. 1d., as above mentioned, commencing 3d December 1761, and ending 8th January 1773.

The respondents answered, that these were not sufficient evidence that the sums of money libelled were borrowed by the deceased Henry Waddel from his brother William, and that the whole case rested therefore on certain suppositions and conjectures emanating from the appellant. That, in point of law, the book and accounts kept by Henry was not sufficient to support such a demand. The book was not a formal or accurate ledger, but a small pocket book, relating to Henry's business as an agent.

Jan. 20, 1789. The Court adhered to the Lord Ordinary's interlocutor,
Feb. 10, — notwithstanding two reclaiming petitions.
Mar. 3, —

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

LORD CHANCELLOR THURLOW said,—

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“ I must lay aside all the computations and comparisons of William JAFFREY, &c. and Henry Waddel’s fortunes, and the allegations as to abstraction v. or concealment of papers, no such thing having been proved. That ALLAN, &c. the sole question was, Whether Henry’s account pocket book, and the paper containing the account in 1773, were evidence to support the demand? That they afforded strong ground of suspicion that Henry died possessed of William’s money to a considerable amount, was beyond all question; but I cannot consider these documents as amounting to legal evidence. It was not this cause alone which he had to consider, but the danger of such a precedent of introducing loose evidence. He therefore moved to affirm.”

It was therefore ordered and adjudged that the intorlocutor complained of be affirmed.

For Appellant, *R. Dundas, Thomas Macdonald.*

For Respondents, *J. Anstruther, Wm. Adam.*

[Mor. p. 4949.]

HENRY JAFFREY and Others, Partners of the Stirling Banking Company, (Stein’s Creditors,)	} <i>Appellants ;</i>
MESSRS. ALLAN, STEWART & Co.,	
	<i>Respondents .</i>

House of Lords, 23d Dec. 1790.

BANKRUPTCY—SALE—DELIVERY—RESTITUTION—FRAUD—STOPPING IN TRANSITU.—A party, a distiller, had entered into a bargain for the purchase of an extensive quantity of grain from the respondents, while he was verging towards, and on the eve of bankruptcy. The grain was furnished; and, up to the date of the bankruptcy, between 20 and 30 cargoes stood thus: 1. The greatest quantity was delivered more than three days before bankruptcy; 2. Several cargoes were delivered within the three days of bankruptcy; and, 3. At the date of his becoming bankrupt, several cargoes had arrived at the port of delivery, but were not then landed, but lay in the ships before being carried to the warehouse of the buyer. The respondents claimed restitution of the whole; in regard to the first, on the ground of presumptive fraud. In regard to the second, on the ground of positive fraud; and in regard to the third, on the ground of their right to stop in tran-

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situ on emerging bankruptcy. Held, that they were not entitled to restitution of what was delivered more than three days before bankruptcy; but that they were entitled to restitution of that delivered within three days of bankruptcy, as well as that taken possession of on board of the ships at the port of delivery. Reversed in the House of Lords, and held, that there were no circumstances inferring presumptive fraud, or fraud of any kind, in this case, and that the fact of goods delivered within three days of bankruptcy is not *per se* a circumstance from which fraud may be inferred: and case remitted back to Court of Session, to take evidence and hear parties further on the point of stopping *in transitu* in regard to the grain at the port of delivery.

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For a considerable time previous to his bankruptcy, James Stein, late distiller in Kilbagie, had been carrying on an extensive trade, but, unknown to any one, under great difficulties, so much so, that he had communicated to his nephew, an intention to stop payment in July 1787. In September, to the same party, he says by letter, "I have £32,500 to pay this and next month. I am really diffcult about it." In October he writes that he is £5000 short for the week, and adds, "he must absolutely stop payment." In order to keep up his credit, the circulation of bills was resorted to, aided by a plan of raising up two nominal companies for that purpose. It was in these circumstances, and of this date, that he entered into a contract with the respondents, whereby the latter were to supply him with all their grain at seven months credit. They were then ignorant of his situation, which he managed to conceal from them. It appeared in February following that a bill was passed making alterations on the distillery laws calculated to injure distillers in general, and on the 19th February a cow was sent him by the minister of Alloa for purchase, but this is returned, stating, "On account of the distillery laws he has this day curtailed his operations."

Oct. 31, 1787.

Feb. 19, 1788.

Feb. 23, 1788. Mr. Stein finally stopped payment on 23d Feb. 1788.

Between October 1787 and 23d Feb. 1788, the respondents had supplied him with 20 or 30 cargoes of grain. At the time of the bankruptcy, four cargoes not then landed, but lying in the ships at the port of delivery, were taken possession of by the respondents, and of other cargoes part was landed on 7, 12, 13, 18, 19, 20, 21, 22, and 23 Feb. When these were shipped off, the respondents usually took bills of lading in their own name, and indorsed them to the

bankrupt, who got a bill in return at seven months. The last cargo was shipped on 4th February, and next day they got from Stein a bill at 7 months date for the amount. The questions were, 1. Whether the respondents were entitled to restitution of the grain delivered within three days of bankruptcy, on the ground of presumptive fraud, arising from concealed bankruptcy; 2. Whether they were entitled to restitution of grain delivered more than three days prior to bankruptcy, from actual fraud inferred from the circumstances of the case; and, 3. Whether the creditors (appellants) were entitled to have the grain taken possession of by the respondents at the port of delivery restored to them?

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The Court found "the petitioners (respondents) entitled to restitution of the grain delivered by them into the granaries of James Stein, within three days of the 23d Feb. 1788, when he stopped payment, and which then remained in his possession unmanufactured." And "appointed them to give in a condescendence, specifying the particular acts inferring fraud, upon which they found their claim of restitution of the grain delivered to the bankrupt more than three days prior to the bankruptcy." On reclaiming petition, this interlocutor was adhered to.

Dec. 3 and 11,
1788.

Dec. 4, 1788.

Mar. 3 and 4,
1789.

The appellants petitioned the Court, praying that the four cargoes seized and taken possession of by the respondents ought to be restored to the creditors; but the desire of this petition was refused.

Mar. 4 and 5,
1789.

The respondents then gave in their condescendence, which stated, that they had access to the books and letters of the bankrupt, and were prepared to establish fraud, from the facts which they disclosed. They quoted passages from several letters, leading to the suspicion of fraud; and stated that they would, if allowed, prove others. They also offered to prove various acts of fraud, or facts and circumstances inferring it, by the oaths of witnesses, and also to instruct the extent of the bankrupt's insolvency at different periods, from all which, fraud of three different kinds would be established. 1. Fraud in taking the goods with a deliberate intention never to pay them; 2. Fraud by positive acts, and efforts resorted to for deceiving the respondents as to their credit; 3. Fraud, consisting of falsehood, deceit, and imposition, employed by an insolvent party to prevent his credit in general from failing.

The Court, of this date, found "the facts and allegations stated in the condescendence are not relevant to infer

1790. " fraud, so as to entitle Messrs. Allan, Stewart and Company
 ——— " to restitution of the grain delivered by them more than
 JAFFREY, &C. " three days prior to the bankruptcy of James Stein ; and
 v. " therefore refuse a proof thereof."
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The appellants appealed to the House of Lords against these interlocutors, in so far as they gave restitution of the grain within three days of bankruptcy ; and also, in so far as their petition was refused for having the four cargoes of grain restored which were taken possession of by the respondents after the arrival of the ships at the port of delivery. A cross appeal was brought by the respondents against the last quoted interlocutor of 5th March 1789, finding the facts and circumstances condescended on not relevant to infer fraud, so as to entitle to restitution of that delivered more than three days before the bankruptcy.

Pleaded for the Appellants.—A contract of sale, followed by delivery of the goods, as in this case, operates as a complete transfer of the property ; and the seller, once this transfer is completed, can have no lien or security for payment of the price, even although he may have been deceived by trusting to one who knew he was insolvent, and probably would never pay. In this there is no fraud. There is no fraud in a merchant's going on in trade as long as he can—no fraud in concealing his difficulties, and no art or deception used, while he merely struggles on to the last. The doctrine, that any thing done within three days of bankruptcy, entitles to restitution, is therefore not to be supported, because of the advanced stage of commerce, and of the injury that it may do to the general body of creditors—to the benefit and advantage of a particular creditor. In entering into such contracts, the seller must undergo the usual risks of the party with whom he deals. It is not usual to ask the purchaser if he is solvent ; nor for the purchaser to explain any thing injurious to his own credit. There is no authority except *Inglis v. Cave*, Dict. vol. i. p. 336, for holding that transactions entered into within three days of bankruptcy, are void on presumed fraud. But, supposing that to be the law, it could not apply to this case, where the contract had been entered into on 31st Oct., and the last sale sent off on 4th Feb. following. Yet the case founded on stands alone, unsupported by any other authority ; and the presumption, that goods delivered within three days of bankruptcy have been fraudulently purchased, has no foundation in the law of Scotland, and is not referred to

by the institutional writers. This being the case, in reference to the grain within the three days, the conclusion is inevitable with reference to that delivered more than three days prior to the bankruptcy. And, in regard to the cargoes taken possession of after arrival at the port of delivery, and while on shipboard, the appellants submit that the bill of lading being indorsed to the bankrupt, and the transit being at an end, delivery was completed, and therefore they were entitled to have these restored.

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Pleaded for the Respondents.—The rule of restitution of goods delivered *intra triduum*, or restoring to the seller what he has delivered to the insolvent purchaser *qui cedit foro*, or becomes bankrupt within three days after delivery, is a fixed point in the law of Scotland. Bankton says: “It has already been observed, that when a person, knowing himself to be insolvent, buys goods on trust, the seller is preferable, as to the property of such goods, to the buyer’s creditors; but this preference is restricted to the goods received within three days of the bankrupt’s going aside by absconding,” &c. This rule is founded on a legal presumption of fraud, and the doctrine in Bankton and Cave’s case was recognized and repeated in Shepherd v. Campbell and Robertson in 1775, where the doctrine of presumptive fraud was given effect to. So that it is erroneous to state, as the appellants do, that the presumption *intra triduum* rested entirely on the authority of a single case. Here the date of the delivery, and not the date of the bargain or contract, is to be considered, and therefore whatever was delivered within the three days of bankruptcy, the respondents ought to have restitution of, as on presumed fraud. And in regard to the actual fraud, so as to entitle the respondents to restitution of that delivered more than three days prior to the bankruptcy, this affords, beyond all doubt in law, a good ground of restitution. The question is, have there been actual fraud in this case? If the whole circumstances stated in the condescendence were proved, there could be no doubt of actual fraud. They were induced to enter into the contract upon the representations of Smith, Stein’s active agent, that Stein was worth £50,000 or £60,000, while in fact he was not worth one shilling. Smith’s oath would have proved this, had it been allowed, and the banker’s account shown by Stein and Smith to induce the belief that he was of substantial credit, would also have established the same fact.

House of
Lords, Nov.
8, 1776. *Vid.*
ante. vol. ii.
p. 399.

After hearing counsel,

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LORD CHANCELLOR THURLOW :

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“ I reject the rule of presumptive fraud in this case, because, after attentively examining the adjudged cases relied on, in support of the judgment of the Court of Session, I cannot perceive that the Court have ever proceeded on that positive rule, which the sellers had contended to be now fixed law. It is rather my opinion, from the examination of those cases, that the Court had considered the failure within three days as *one* circumstance only, from which fraud might be presumed, but not as that from which singly fraud was to be absolutely inferred, though other circumstances might show there was none. In the present case, there was not a single circumstance condescended upon, which applied more to the three days immediately preceding the bankruptcy, than to an earlier period, and the buyer's failing within three days after the transaction, or after the receipt of the goods, was not *per se* sufficient to void the contract. There were no circumstances condescended on which inferred fraud : on the contrary, it seemed to be made out, that Stein had no intention of stopping or giving up his trade till 23d Feb. 1788 ; and consequently, till then, he had a right to make contracts, or to receive goods delivered in performance of contracts previously made, just as any merchant or dealer would do in the usual course of trade.

“ But the question is, Whether the respondents (vendors) were entitled to stop certain quantities of grain, which were consigned or forwarded by them to Stein the bankrupt, before the actual delivery to him, the bankruptcy having intervened ? By the law of England, and, as I conceive, by the law of Scotland also, the shipping of goods to one who commissions them, or the delivery of them to a carrier to be conveyed to him, was a completed sale. But within the last hundred years, a rule has been introduced, from the customs of foreign nations, that in the case of the vendee's bankruptcy, the vendor might stop and take back the goods *in transitu*, or before they came into the hands of the vendee ; and this is certainly now a part of the law of England, and I understand it to be the law likewise of Scotland.”

It was therefore ordered and adjudged that the said interlocutor of the Lords of Session, dated the 3d, and signed the 11th December 1788, finding the respondents entitled to restitution of the grain therein mentioned ; and also the interlocutor of the said Lords, dated the 3d, and signed the 4th March 1789, adhering thereto, complained of by the original appeal, be, and the same are hereby *reversed*. And it is further

ordered and adjudged, that the interlocutor of the said Lords, dated the 4th, and signed the 5th March 1789, also complained of by the said original appeal, be, and the same is hereby also *reversed*, without prejudice to the respondents in the original appeal insisting and producing evidence to show that they were entitled to stop and detain the grain consigned by them to James Stein the bankrupt *in transitu*, or before *actual delivery*; and also without prejudice to the appellants in the original appeal making such objections thereto as they shall be advised. And it is hereby further ordered that the cause be remitted back to the Court of Session in Scotland, to take such evidence, and to hear the parties; and to do therein what shall appear to them just as to that point. And it is further ordered and adjudged, that the said interlocutor of the said Lords, dated 4th, and signed 5th March 1789, complained of by the cross appeal, be, and the same is hereby affirmed.

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For Appellants, *Ilay Campbell, Allan Maconochie.*

For Respondents, *A. Pigott, Math. Ross, Cha. Hope.*

MAGDALANE BARBARIE DE LA MOTTE,	<i>Appellant ;</i>
SIR WM. JARDINE of Applegirth, formerly }	<i>Respondent.</i>
Captain Wm. Jardine, . . . }	

House of Lords, 25th Feb. 1791.

DIVORCE—PROOF—RE-EXAMINATION OF WITNESS.—Where bribery and malice were objected against a witness adduced, the objector allowed a proof of these before oath was allowed to be put. A party, after she had adduced four witnesses to prove the above objections, prayed the Court, by minute, to be allowed to re-examine these four witnesses, in order to prove certain conversations, said to have taken place with James Spalding, Margaret Johnstone, and Thomas Brockie, witnesses for the respondent, about the time, or after they had given evidence in the cause. Held, that this was incompetent, the intention being to discredit the respondent's witnesses, by proving those conversations, and the facts besides not falling within the conjunct probation.

This was an action of divorce, raised by the respondent

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against his wife, for acts of adultery committed by her with Lieut. Samuel Pleydell, the respondent's nephew.

A proof being allowed, in the course thereof, objections were stated to several witnesses, in particular to Margaret Johnstone, who had been the waiting woman of the respondent, and to James Spalding and Thomas Brockie, two of the men servants in the family. The objections to Margaret Johnstone were: 1. That, before or since the time of her being cited as a witness, she had received from the respondent, and others employed by him, considerable sums of money for giving evidence in the cause, and that she had been promised a settlement for life, on condition of giving her testimony against the appellant: 2. That she had repeated private communications with the respondent, and those employed by him, and had desired information how she should depose: 3. That she was an ultroneous witness, from views of gain and revenge; that she bore ill will and malice against the appellant, and had repeatedly declared, that if she were admitted as a witness, she would ruin the appellant: 4. That for sometime past, and at this moment, she is lodged, boarded, and clothed at the expense of the respondent, much beyond her station.

The objections to Spalding and Brockie were in these words:—" That they have both received money, or good
" deeds and reward, for giving evidence in this cause, and
" that both of them, particularly the former, have given ad-
" vice and assistance to the pursuer in managing this cause;
" and, in particular, in tampering with Margaret Johnstone." As to Thomas Brockie, these objections were afterwards judicially passed from; but, as to the others, the Commissaries allowed a proof of these objections. Accordingly, *before these two witnesses were put on oath*, nine witnesses were examined, for the purpose of disqualifying them. But the Commissary, after proof and full debate thereon, found " the
" proof brought insufficient to establish the charge of brib-
" ery or malice against the said witnesses, and therefore
" allow them to be examined, reserving all objections to
" their credibility."

This interlocutor was acquiesced in by both parties, and the witnesses examined accordingly; after which the proof proceeded, and finally established the adultery against the appellant. Finding this to be the case, she betook herself to the plea of recrimination, and after repeating a summons to this effect, the Commissaries found no proof to support

such a plea. She then resorted to her original plan, of attempting to discredit the respondent's witnesses; and, with this view, she gave in a minute and condescendence, desiring leave to re-examine four persons whom she formerly adduced upon her proof of objections, by whom she proposed to prove certain conversations said to have taken place between James Spalding, Margaret Johnstone, and Thomas Brockie, witnesses for the respondent, about the time, or after they had given their evidence in the cause.

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The Commissaries pronounced this interlocutor:—"In Aug. 29, 1787. "respect the interrogatories have no connection with any "fact stated in the libel, and do not fall within the meaning "of the conjunct proof allowed to Mrs. Jardine, but have "no other tendency than to discredit the depositions of the "witnesses, setting up in opposition thereto a proof of conversations alleged to have taken place among the witnesses "after being examined; find the interrogatories incompetent, "and refuse to put the same."

Thereafter the Commissaries pronounced decree, finding the libel proven, and decerned. This decree was extracted when the appellant brought a reduction of the decree.

The Lord Ordinary pronounced judgment, repelling the June 14, 1788. reasons of reduction, assoilzied the respondent, and decerned; and, on two reclaiming petitions to the Court, they adhered. —28, —29, —

These interlocutors were appealed to the House of Lords.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Arch. Macdonald, Jas. Allan Park.*

For Respondent, *Sir J. Scott. T. Erskine, Robert Dallas.*

WILLIAM MOREHEAD, Esq.,

Appellant;

CHARLES EDMONSTONE, Esq.,

Respondent.

House of Lords, 28th Feb. 1791.

SASINE—DISPENSATION CLAUSE—TITLE—QUALIFICATION.—Held, terms of dispensation clause in a charter sufficient to authorize infestment at the place mentioned in the charter, for any part of the lands, as well as for the whole. Also, that the valuation of

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the lands having been fixed by a decret of the Commissioners of Supply, the same must stand good, and entitle the proprietor to be enrolled as a freeholder of the county.

At a meeting of the freeholders of Stirlingshire, held for electing a member of parliament, the following objections werestated to the respondent's title to be admitted to the roll, viz. 1. That the claimant's sasine is void and null, in respect that the dispensing clause in the charter gave no authority for taking infestment at the Manor Place of Kilsyth, quoad his lands; for although it bears that a sasine to be taken there should be sufficient for the *whole lands* and others mentioned in the charter, it contains no declaration that such sasine should be sufficient for *any particular part* of these lands; 2. The claimant's pretended qualification is altogether nominal and fictitious, and was never intended to give him a free and independent freehold for his own behoof; 3. That, in the valuation book, the lands of Clangor stand valued at £710. 18s. Scots; and the teinds thereof at £100 Scots, and although these cumulos were thrown together and divided in 1707 among the different parcels composing the lands of Clangor, and which division was approved of by the Commissioners of Supply in 1786, upon the application of Sir Arch. Edmonstone, and the different parcels of land now claimed on do, with the teinds thereof, according to this decret of approbation, stand valued at £410. 13s. 4d. Scots, yet the titles produced by the claimant do not give him any right whatever to the teinds; and, consequently, it does not appear that he is possessed of the valuation required by law.

In answer, it was stated; 1. That the clause of dispensation in the charter did authorize the taking of sasine in the way that had been done. Clauses of union and dispensation, when properly expressed, may support an infestment in a particular parcel of lands, although taken at a place beyond the boundaries of such parcel. The objection says, that the clause only allows infestment to be taken *of the whole lands* at the Manor Place of Kilsyth, or upon the ground of any part of the lands, but gave no authority for taking infestment of *any particular parcel*, except upon the ground thereof. The bare perusal of the clause must show this objection to be frivolous; the words "*pro omni parte earundem*," certainly mean, for every or any part of the lands; and being used after the words "*pro dictis totis terris*," plainly point



out what was meant. It is therefore clear that sasine may be taken at the Manor Place for the whole estate, and also for every or any part thereof; 2. That the qualification was neither nominal nor fictitious; 3. That the valuation of the lands was legally ascertained by a decret of the Commissioners of Supply; and, 4. That the objection as to the teinds was irrelevant, as had been determined in several cases. Although his titles gave him no right to the lands *and the teinds*, yet they gave him right to the lands, with the parts, pendicles, and pertinents, and all the charters granted to the vassals contain both lands and teinds, and the vassals have always been in possession of both for time past memory. It will not do therefore to attempt, as is here done, to separate the teind from the land, and in this way reduce the valuation below the requisite qualification.

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The Court of Freeholders sustained the objections; and, on complaint to the Court of Session, the Court pronounced this judgment:—"repel the objection to the complainer's sasine; and also repel the objection to the valuation of the complainer's lands."

Dec. 9, 1790.

Against this interlocutor the present appeal was brought.

After hearing counsel, it was

Ordered and adjudged that the interlocutor be affirmed.

For Appellant, *Alex. Wight, Sylv. Douglas.*

For Respondent, *George Ferguson, J. Campbell.*

NOTE.—Another case, *Muirhead v. George Edmonstone*, was determined in the same manner. Also, *Muirhead v. Johnstone of Alva*, determined a few days thereafter.

PETER SPEIRS, Esq.,	.	.	<i>Appellant;</i>
SIR ALEXANDER CAMPBELL, Bart.,	.	.	<i>Respondent.</i>

House of Lords, 5th March 1791.

FREEHOLD QUALIFICATION — TRUST DEED — APPARENT HEIR'S RIGHTS.—Held, although a deceased father had left his whole estate to trustees, who were infeft, that his heir was still entitled to be enrolled as possessing a good freehold qualification,—the possession of the trustees being for his behoof, and their possession being considered as his.

The respondent having claimed to be enrolled as a free-

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holder for the county of Stirling, in order to vote for the election of a member of parliament; it was objected to his claim, that his father having conveyed his estate to trustees for the purposes mentioned in the trust deed, he was entirely divested. To this objection it was answered; That the trustees named by his father had no possession but for his behoof, and that their possession under their base infestment was to be accounted his possession: that it was a proposition founded in the words of the act 1681, c. 20, that a trust deed, though granted for the behoof of creditors, does not deprive the *truster* of his freehold qualification, that act having expressly declared, “that no person infest for relief or payment of sums shall have vote, but the granters of the said rights, their *heirs* and *successors*.” That so standing the case, the respondent would have been entitled to be enrolled, although the trustees had been publicly infest upon a charter of resignation from the crown; and, *multo magis*, must be so entitled, when it was considered that these trustees were only base infest. It was also objected, that the valuation of the lands on which he claimed being below £400, he had no right to be enrolled. It was answered, that the valuation of the Commissioners of Supply was evidence to the contrary, and it must stand good until reduced.

The Court of Freeholders rejected his claim to be put on the roll; and he complained to the Court of Session. The Dec. 14, 1790. Court of Session found, “that the meeting of freeholders did wrong in refusing to put the complainer upon the roll of electors for the county of Stirling; and therefore ordain his name to be inserted in the roll in its proper place.”*

Against this interlocutor the present appeal was brought to the House of Lords.

After hearing counsel, it was

Ordered and adjudged that the interlocutor be affirmed.

For Appellant, *Alex. Wight, Sylv. Douglas.*

For Respondent, *Geo. Ferguson, J. Campbell.*

* Opinions of the Judges:

LORD PRESIDENT CAMPBELL.—“There are *two objections*; 1st. Title; and, 2d. Valuation.

“As to the first, no want of possession. It is a lucrative succession, though under entail and trust. Sir Alexander represents his father—lives at Gargunnock, and receives from the trustees that por-

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SIR JAMES RIDDELL, Bart., . . . *Appellant* ;
JAMES GROSSET, Esq., . . . *Respondent*.

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v.
GROSSET.

House of Lords, 23d March 1791.

LEASE—ERROR IN SUBSTANTIALIBUS—PAROLE.—Circumstances in which a lease of land was entered into for 31 years, specifying a yearly rent of £600 per annum, and also a prescribed rotation of cropping. Nothing was mentioned in the lease about the number of arable acres of land ; but the tenant understood that there were, as had been represented, 600 acres of arable land ; and, as he was taken bound by the lease to have 300 acres in tillage, each year of the lease, which proceeded on the footing that there were 600 acres of arable land, he insisted that the lease should be reduced and set aside, in consequence of there not being that quantity of arable land on the farm. The Court of Session held him liable for the full rent.—Reversed in the House of Lords, and lease reduced and set aside, and held him only liable at the rate of £450 per annum for the three years during which he possessed the farm.

The respondent took in lease from the appellant, for a period of 31 years, the house and lands of Mains, at a year-

tion of the rent which is allowed him. The entail disposes the estate in his favour as institute ; and he is apparent heir of investiture. The possession of the trustees is his possession ; and civil possession is sufficient. But the objection is, that his title is defeasable, as the trustees may sell to a purchaser, who may execute the procuratory. The renunciation of little consequence, as it only binds them personally, and it is not recorded in the register of sasines ; and even if it was, I doubt if it be a feudal method of securing Sir Alexander in the superiority. But, independent of this renunciation, can it be said that he is divested of the right of apparency, by a settlement in his own favour, or, which is the same thing, in trustees for him, the *dominium directum* still remaining in *hereditate* untaken up ? The objector must be able to show that a trust conveyance, for the purpose of management, and for the heir's own behoof, *quoad* the reversion, is an alienation from the heir.

“ Sir Alexander is entitled to take a charter upon the procuratory in the entail, or, which is the same thing, as to third parties, to be served upon the former investitures, and so to complete the feudal right in his person, which is not inconsistent with the feudal right being also in the trustees. Query : Would not his wife be entitled

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ly rent of £600 per annum, the said lease fixing the rule of rotation and cropping the lands; and providing that in each year there should always be 300 acres in tillage. This com-

to her terce, or to the jointure allowed by the entail, upon his making up such titles? Frazer of Lovat in a similar situation. Suppose the trustees also infeft upon a charter from the crown, would this entirely denude him of the feudal right of his estate, and his wife of the terce? What if Sir James was living, and had put his estate under trust in his own life, would this have been a good ground for turning him off the roll? Case of Sir Lud. Grant is very much in point, also case of Crawford in Renfrewshire, who was in worse circumstances. Infeftment is really in security till a sale actually takes place, which will of course denude him, but, in the meantime, the estate belongs to nobody but him.

“As to the valuation, the division in 1740, if done by a private meeting, was done without evidence of any kind. The procedure in 1753 more regular, and has continued the rule for near forty years. See case of Shaw Stewart 1780, Wight, p. 201, where twenty years’ acquiescence was held sufficient against a much worse objection. But there is no *ex facie* objection to the decree of 1753, and therefore it must continue the rule until it is reduced. The original valuation was *in cumulo*, and doubt if the division 1740 could be regarded. The Commissioners of Supply entitled to act to the best of their judgment, and not tied down to such rigorous rules.”

LORD JUSTICE CLERK.—“As to the valuation, I must say that it brought him under £400. As to whether it be null, may take under consideration the valuation books. I incline to think it was a public meeting. But the question in 1753 was, how they should proceed? But, having the whole before them, judge it better to take original *cumulo* valuation. They judged rightly. The proceedings in 1740 were null for want of proof. Supposing they had been wrong, yet, as it has been acquiesced in for thirty-seven years, objection elided.”

LORD ESKGROVE.—“The division in 1740 is clearly null, but that of 1753 continued the rule for 37 years, which bars objection.”

LORD DREGHORN.—“Of same opinion.”

LORD JUSTICE CLERK.—“As to trust, I am clear that there is nothing in the objection. In adjudications, the reverser has the substantial right and interest, till the property is evicted. In rights in security the same rule holds.—A power to sell is common, but makes no difference. The possession of the creditors and trustee, is the possession of the truster. Every shilling that is uplifted, goes to the payment of Sir Alexander’s debt.”

LORD MONBODDO.—“Of same opinion.”

putation of 300 acres proceeded upon the footing, as stated by the tenant, that the ploughable land consisted of 600 acres.

The tenant, soon after entering the farm, discovered that there was not more than one half of this quantity of ploughable land on the farm; the other part being in a state not fit for tillage, and consequently, as he stated, it was impossible for him to implement the conditions of the lease. In consequence, he brought an action of reduction to set aside the lease, on the ground of error in substantialibus of the lease, and false and fraudulent representation.

The landlord (appellant) stated, that nothing could be fairer than the manner in which the whole bargain for the lease was gone into.—That he had never stipulated, either in the lease or otherwise, that the farm contained 600 arable acres. The tenant came and carefully inspected the whole lands, staying for a whole week, and perambulating the grounds day after day to ascertain both the quality and extent of the land, and that at the end of that period he had expressed himself satisfied, and had desired to enter into articles in regard to the lease;—had actually written out the agreement with his own hand, and had thereafter a whole year to think of it before any regular lease was executed and signed between them.

To this action were subsequently added another, at the respondent's instance, praying the Court to declare, that the rent of the said lands of Mains and others, contained in the lease, should be £300 yearly for the three years during which it had been possessed, and, upon payment thereof, that he should be freed and discharged of all rents prestable by him, as tenant for the said three years. Also for £1000, in name of damages, in consequence of the said Sir James Riddell having, by false and feigned representation, induced him to enter into said lease, and to come with a large family from a foreign country, at a great distance, to take possession of the said lands at considerable loss and expense.

The appellant also brought an action, stating the lease,

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LORD GARDENSTONE.—“Of same opinion.”

LORD ESKGROVE.—“Of same opinion.”

LORD SWINTON.—“Of same opinion.”

LORD ROCKVILLE.—“Of same opinion.”

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and the several agreements therein contained, and praying that the Court would order and decree the respondent to make payment to him of the rent of the farm of Mains, at the rate of £600 Sterling per annum, in equal moieties. And also to make payment of the sum of £3 of additional yearly rent for each acre he had cropped the farm contrary to the stipulations of the lease, during these three years, and for £3000 as damages for failing to implement the stipulations and conditions of the lease.

In the course of these suits, the landlord and tenant came to an agreement to void the lease for the remaining period thereof, without prejudice to these actions.

A proof was allowed, as to the extent of the arable land; and as to the tenant's having all along understood that there were 600 acres arable.

The respondent founded much upon the fact, that, by a plan and survey of the lands made by one M'Cartney, it appeared there were only 290 acres, 1 rood, 35 falls arable; 92 acres, 3 roods, 25 falls meadow; 86 acres, 23 falls doubtful. In all, amounting to 439 acres, 2 roods, 3 falls. These facts were also spoken to by witnesses.

On the other hand, the appellant contended that the respondent had failed in proving:—"That he had understood, or been made aware there were 600 acres of arable land; that he proceeded to crop the lands upon that footing: Or that, in fact, there was not more than one half of that number of arable acres on the whole farm.

Dec.18, 1789. The Court, of this date, pronounced this interlocutor:

"Conjoin with the process of reduction, the relative processes brought at the instance of James Grosset, the pursuer, against Sir James Riddell; and also the process at the instance of Sir James Riddell against James Grosset; and having advised the state of these conjoined processes, with the testimony of the witnesses adduced, writs produced; the Lord's assoilzie Sir James Riddell from the process of reduction: Find James Grosset is not entitled to any abatement of the stipulated rent, for the three years during which he possessed the farm in question; and assoilzie Sir James Riddell from the claim: Find that Sir James Riddell is not entitled to interest on the arrears of said rent, nor to damages or penalties, and assoilzie Mr. Grosset accordingly. Find no expenses due to either

Jan.27, 1790. "party."—On reclaiming petition the Court adhered.

Against these interlocutors the appellant brought an appeal,

in so far as they refused him interest on the rents as they became due, damages, or the penalties in lieu thereof, and the expenses of process. And the respondent entered a cross appeal against so much of the said interlocutors as assoilzies Sir James Riddell from the process of reduction, and finds that he is not entitled to any abatement of stipulated rent for the three years. And also, in so far as they do not find him entitled to damages and expenses of process.

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Pleaded for the Appellant.—1. The pursuer, Grosset, having abandoned and given up his original pleas of fraud and imposition, the Court did wrong in allowing a parole proof, in opposition to the evidence of the written contract of lease, it being a principle recognized in law, and confirmed by your Lordships' decisions, that where a contract or agreement has been fairly entered into, and legally executed, no parole proof shall be admitted to contradict the terms of such contract or agreement. The proof therefore ought to be laid out of the cause, and the case judged of according to what appears on the face of the lease. Now, one clause in that lease, besides stipulating a rent of £600 per annum, also stipulated four shillings of penalty, for each pound of principal in which he failed in payment of said rent, as also the legal interest of the said rent from and after the said terms of failure. This being a fixed and certain covenant, the interest and penalty is as much due to the appellant as the rent itself. And so, in like manner, is the stipulation of £3 per acre, for every acre that was cropped contrary to the rotation laid down in the lease, in consequence of the respondent not pursuing the mode of husbandry laid down therein. Besides, the appellant conceives, he is well entitled not only to the penalty of £1000, stipulated by the lease for breach of covenants, but also to expenses of process. The respondent set out with an allegation of fraud, which he afterwards abandoned. He has failed to prove the smallest article which he alleged as to the extent of the arable land or otherwise, and therefore costs ought to fall on him. 2. As to the cross appeal, the Court were unanimous that there were no grounds for voiding the lease. Whether he might have been mistaken in the quantity of the arable land is not the question. The agreement for the lease was fairly and deliberately made. Mr. Grosset, his son, and Mr. Theed, were four days on the farm, examining it with the utmost care and attention; he himself made the offer of the rent, and drew up the agree-

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ment, and there was an interval of 12 months between the commencement of the treaty and his executing the lease, during all which time he had it in his power to make any further inquiries he might think necessary.

Pleaded for the Respondent.—If the matters had remained on the footing they were when the respondent commenced his action of reduction, the lease must have been set aside, on account of the error in the substance of the contract, or because what the appellant professed to let, and the respondent to take, did not exist. That this is founded in the principles of the law of Scotland, was laid down by all the judges, and that the doctrine applied to the facts in this case, was allowed by them all, one only excepted. The subject matter of the contract was a farm, in which there were included 600 acres of arable ground, capable, in the usual course of husbandry, of being cropped and managed in the way pointed out by the lease. The covenants with respect to the succession or rotation of cropping, with the limitation, *that not above 300 acres were to be in tillage in any one year*, necessarily imply, that there were 600 arable acres. Four years of culture were to be succeeded by four years of hay or pasture, and therefore it is demonstrably plain, that the grounds so converted, must have been meant to be supplied by an equal, or nearly equal quantity to be put under crop, otherwise the stock and occupation of the farmer must have been changed every four years. Now, is it any refutation of this to observe, that there was no obligation on the tenant to have constantly 300 acres under crop, and that the rotation might have been followed though the arable lands were much under 600 acres, or with any given number? When it is considered that the mode of cultivation was in favour of the lessor, in order to keep the whole in a regular course of husbandry, and to insure its being left in that state at the termination of the lease, it will be perfectly obvious that mentioning 300 acres as the amount of what was to be at any one time in tillage, observing the rotation, was precisely tantamount to saying that 300 acres was the moiety of the ploughable land. No farmer who read this lease, and (without knowing of the dispute which has arisen) was asked how many arable acres the tenant, who was bound to the conditions it contained, must have had, could hesitate in answering. It being therefore undeniable that the subject bargained for did not exist, the lease ought to be set aside and voided, as founded on error *in essentialibus*. Assuming

the lease to be void, it was somewhat inconsistent in the Court below to make that lease the rule of fixing the rent during the respondent's three years of possession. The ground the Court went upon was, that the deficiency of the arable acres could not be felt by the tenant, till an after period, which, with great submission, is plainly wrong; for the total rent covenanted to be paid was, in respect of the whole farm, according to the idea erroneously entertained, and therefore the deficiency operated to the tenant's prejudice from year to year. Besides, it has been proved by the witnesses adduced by both parties, that upon a lease for 31 years, the farm was worth no more than £357 per annum.

After hearing counsel,

The Lord Chancellor stated his reasons for differing with the Court below, and reversing in part.—(No note of the reasons has been preserved.)

It was therefore ordered that the interlocutors complained of, so far as they assoilzie Sir James Riddell from the process of reduction, and so far as they find that James Grosset is not entitled to any abatement of the stipulated rent for the three years during which he possessed the farm in question, and assoilzie Sir James Riddell from the claim, be reversed; and that the tack mentioned in the summons is hereby reduced, rescinded, cassed and annulled from the beginning, and that the same is now, and shall be in all time coming, void and null, and of no avail. But, in respect that the said James Grosset occupied the lands mentioned in the said tack for the space of three years, find and decree that he ought to pay for the same at the rate of £450 by the year, and that the said James Riddell is not entitled to any further or other damages in respect of the said tack, or the occupation of the lands therein mentioned. And it is ordered and adjudged that, with this variation, the said interlocutors be affirmed. Ordered that the cause be remitted back to the Court of Session to proceed accordingly.

For Appellant, *Sir J. Scott, Robert Dallas.*

For Respondent, *T. Erskine, W. Grant.*

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House of Lords, 1st April 1791.

SUCCESSION — SUBSTITUTION OR CONDITIONAL INSTITUTION. — A party, by his trust deed, left the residue of his estate to his five grandchildren, equally among them, declaring that the share of any one deceasing should accresce to the survivors. Also that these shares should become payable to them, on their attaining the age of 25 years, when the trustees should be bound to pay the same, with interest. Cecilia, one of those grandchildren, survived her grandfather, and also the age of 25, but, in consequence of mental weakness, her share had been allowed to remain in the trustee's hands unpaid. She died, leaving a brother, Samuel Stevenson. Held that the substitution in favour of the surviving grandchildren did not take effect, and her brother preferred to her share.

Samuel Stevenson executed a deed, conveying to trustees his whole estate and effects then belonging, or which might belong to him at his death, for the purpose, (after paying his funeral expenses and debts.) 1. To pay £50 a-year to his wife, and £20 a-year to his son, during their lives; 2. To pay his grandson Samuel Stevenson, and granddaughter Cecilia Stevenson, children of his said son, £30 per annum, for maintenance and education, till they attained the age of 25 years: and to his grandson Samuel Stevenson Graham, and James Graham, and his granddaughter Jean Graham, the sums of £20 per annum, for the like purpose; 3. That when the eldest of his grandchildren attained the age of 25, the trustees should set apart such sums, as that the interest thereof might adequately meet these annuities; 4. That of the residue, after setting apart money to answer the annuities, there should belong £200 to his grandson Samuel Stevenson, and the like sum to his granddaughter Cecilia; 5. That after all these purposes were satisfied, the residue should be divided between all his five grandchildren equally; and, 6. That the capitals set apart to answer the said an-

nuities should also belong to the five grandchildren, and be divided among them, after these annuities were determined.

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There was then the following clause:—" That failing any
 " one of my five said children by death, the share or shares
 " of the deceased, *so far as remains unpaid*, shall accresce
 " and appertain to the survivors of my said children equally,
 " or to the survivor, and shall become due and payable at
 " the first term of Whitsunday or Martinmas after their re-
 " spective ages of 25 years ; and the trustees shall be bound
 " and obliged to pay the same accordingly, with interest
 " from the respective terms of payment, aye and until pay-
 " ment."

The granddaughter Cecilia survived her grandfather, and attained to the age of 25 years, when she was entitled to payment of her share of the residue ; but, in consequence of mental imbecility, her guardians never received her share, but allowed it to remain in the trustee's hands, only receiving from time to time sums necessary for maintenance. Some years thereafter she died. And the question raised in this suit was :—Whether her share belonged to her brother Samuel Stevenson, as her personal representative ? or whether it accresced to the surviving grandchildren, so as to entitle her cousins, as well as her brother, to a share ? For the appellants, three of the surviving grandchildren, it was contended that, by the law of Scotland, it was competent and common, in money obligations, to substitute one person to another : for example, to A.B, whom failing by decease to C.D, and the effect of such substitution is, that though A.B, the institute, may defeat the substitution, by levying the money, yet if he does not do so while the same remains due upon the original obligation, the substitute will take, to the exclusion of his representatives. The same rule followed in legacies, in regard to which a substitution is quite competent. It was answered for Cecilia's brother, Samuel Stevenson, that the intention to be gathered from the will was, that the substitution was only to take effect in the event of any of them dying before his or her share became payable at the age of 25.

The Court, of this date, altering an interlocutor of the Feb. 9, 1790. Lord Ordinary, 15 July 1789, found " that the share of the
 " trust funds destined to the deceased Cecilia Stevenson de-
 " volves upon her brother Samuel, as her executor ; and

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“ therefore prefer the petitioner thereto, as trustee for him,
“ and his creditors.”*

Against this interlocutor the present appeal was brought.

Pleaded for the Appellant.—By the words, as well as by the meaning of the will, it was declared that the share of any of his grandchildren deceasing should accresce to the survivors. This is plainly and distinctly expressed, and can admit of no other construction than this—that if any of them died at any time, whether before or after the terms of payment, this substitution was to take effect. But, according to the respondent’s construction of the clause, the substitution or accrescing clause was only to take effect, if any of the grandchildren died before attaining the age of 25 years respectively, a construction which is totally at variance with the express words used; and the expressions “ in so far as not yet paid.”—Which undoubtedly apply to a period anterior to the 25 years of age.

Pleaded for the Respondent.—The whole tenor of this deed shows, that it was not the intention of the truster to make the share of a deceasing grandchild, who survived the age of 25, go to the surviving grandchildren. But, on the contrary, the moment they attained the age of 25 years, it was to be presumed as if already paid and vested in her person, so as to operate an extinction of the substitution. Cecilia lived more than six years after attaining this age, and having died intestate and lunatic, her share must now belong to her brother the respondent. At all events, the right claimed cannot extend to the £200 given her as precipuum, nor to the interest of her share fallen due since her age of 25.

After hearing counsel, it was

* NOTE.—From LORD PRESIDENT CAMPBELL’S Session Papers:—

PRESIDENT.—“ The interlocutor of the Lord Ordinary wrong. It is absurd to make it depend upon the accident of the money being called up or not, whether one rule of succession or another shall take place. It is plainly a *conditional institution*; if any of the legatees shall die before the period when the money should be paid, are the words used. *Paid* and *payable* are synonymous in the language of this deed. Cases of Tennant, &c., which went upon technical words, very different. The case of Coutts was a bad decision. Tortuous conduct of the guardians in this case, in not uplifting Cecilia’s share when it became payable to her, ought not to avail the other grandchildren.”

Ordered and adjudged that the interlocutor be affirmed, with the following addition, viz. without prejudice to any question that may arise upon the death of Janet Irvine, the testator's widow.

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For Appellants, *Sir J. Scott, W. Tait.*
For Respondent, *Alex. Wight, W. Grant.*

[Mor. p. 6083.]

JAMES BAILLIE of Olivebank, Esq., . . . *Appellant;*
MRS. ELIZABETH CHALMERS, . . . *Respondent.*

House of Lords, 6th April 1791.

HUSBAND AND WIFE—DELICTS—EXPENSES.—An action of damages for scandal was brought against a married woman, calling her husband for his interest ; and judgment with expenses pronounced against her. The Court of Session held the husband liable for the expenses of process (£688). Reversed in House of Lords, and held him liable in expenses, only in so far as he was responsible for the conduct of his defence, as this might be found to be malicious, vexatious, or calumnious ; and remit made to inquire into this.

An action of damages for slander was raised by the respondent, with concurrence of her husband, against Mrs. Helen Douglas or Baillie, the appellant's wife, and also against the appellant, for his interest. Defences were lodged to this action for Mrs. Baillie, and the appellant, *for himself, and as curator for his wife*, setting forth " That however painful it must be to a person of an ingenuous mind to be accused in a court of justice of maliciously defaming and slandering a neighbour from motives of malice or ill will ; yet the defenders feel less concern at being involved in such an accusation, than at being obliged, in their own defence, to set forth facts, which if the pursuers have any sense of honour and delicacy, must tend to hurt them more than all the expressions the defenders are charged with." Then followed a detail of certain slanders. The defences offered were found to be irrelevant by the Court of Session, after much litigation ; and this judgment being taken by appeal to the House of Lords, was affirmed, and remit made to proceed *quoad ultra*.

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The question now is, Whether the appellant Mr. Baillie is personally liable for the expenses of the suit, taxed at £688?

The case going back to the Commissaries, they pronounced this judgment, finding “ That the defender Mrs. Baillie, “ was guilty of the scandal libelled : That the defender had “ not proved the facts set forth in her condescendence, in “ so far as she was allowed by the Court of Session to prove “ the same ; and that the other articles of the said conde- “ scendence were not *relevant*, and could not be allowed to “ go to proof, and therefore finding *her* liable to a fine to “ the procurator fiscal, and in damages, expenses, and a “ palinode to the pursuer.” The expense, by a subsequent interlocutor, was fixed as above. The damages at £500 ; and found the defender, Mrs. Baillie, liable in £300 more to the procurator fiscal of court as fine. But *they assoilzied the appellant, in respect the libel was not proved against him ; and found him entitled to his expenses, which they modified to £5.*

These points, so determined by the Commissaries, being brought under review of the Court of Session by advocacy, on report to the whole Court on the question, Whether there were grounds in law for subjecting Mrs. Baillie’s husband in payment of the taxed amount of expenses?

The respondent maintained that the appellant, Mr. Baillie, stood forth not only as curator for his wife, but also as an individual, and strenuously pleading the competency of bringing evidence of the truth of the charge made by his wife. That in either capacity, whether as curator or as individual, the conclusion could not be different ; he becomes a party to the suit, and is responsible for the defence which is maintained, and which, if either groundless or injurious, it is enough to warrant the Court to subject him in the payment of the costs. It was answered for the appellant, that his conduct was not blameable in regard to the defence. He had been acquitted, and costs given to him, though the respondent had charged him as equally guilty with his wife ; at least that he “ had approved and acquiesced in what she so “ said of the complainers and their family.” This was not the case, and he was the mere passive engine of the law, lending his name to enable his wife to stand in her own defence.

Feb. 13, 1790. The Lord Ordinary, of this date, pronounced this judgment: “ Having advised with the whole Lords on the “ whole cause, refuses both bills, and remits the cause to

“ the Commissaries, with the following instructions: 1. That
 “ they adhere to their interlocutor, finding Mrs. Helen
 “ Douglas liable in damages to Mrs. Elizabeth Chalmers,
 “ and a fine to the procurator fiscal, but they restrict the
 “ damages to £100, and fine to £10 Sterling. 2. That they
 “ alter their interlocutor with respect to the palinode, and
 “ dispense with the same. 3. That they find that legal
 “ execution cannot pass against the person of Mrs. Helen
 “ Douglas during the subsistence of her marriage, for any
 “ sum awarded in name either of damages, fine, or expenses,
 “ and that the effects and person of James Baillie, her hus-
 “ band, cannot be affected for the sums awarded in name of
 “ damages and fine. 4. That they adhere to their interlo-
 “ cutor finding Mrs. Helen Douglas liable in expenses of
 “ process, and in the expense of extract; and modify the
 “ same to £688; and that they also find the said James
 “ Baillie personally liable to Mrs. Elizabeth Chalmers for
 “ the said £688 of expenses.”*

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* Opinions of the Judges :—

LORD ESKGROVE.—“ The expenses are a part of the damage ; and I cannot distinguish between them. It is a tutor's duty to defend.”

LORD HENDERLAND.—“ The husband holds the goods in communion without account. Principle of delict does not apply here. Suppose the husband had said, ‘ I will not defend this cause, because it is bad’. The Court would not have controlled him. He is the administrator of her funds, and entitled to give up her case. The expenses arise here from his own fact and deed. He is the *dominus litis*, and *temere litigans*.”

LORD DUNSINNAN.—“ Of same opinion.”

LORD MONBODDO.—“ The husband is not liable.—All the expenses incurred by departing from the maxim of law, that *veritas convicii non excusat*.”

LORD HAILES.—“ *Veritas convicii* certainly does not exculpate. Mr. Baillie sued in his wife's name in the Commissary Court.”

LORD SWINTON.—“ The husband truly acted here as the pursuer of a counter action.”

LORD ROCKVILLE.—“ I think the husband is liable for the expense of the suit. He has an interest.”

LORD GARDENSTONE.—“ The husband is not liable for his wife's delicts. Where persons called, not as parties, but only nominally as guardians, &c., it does not follow that the person brought in for forms sake, is liable in expenses. Besides, he offered to make any palinode.”

LORD DREGHORN.—“ The husband may disclaim the action, and

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Against this interlocutor the present appeal was brought, against that part of it which finds James Baillie personally liable for the £688 of expenses.

then a curator *ad litem* will be appointed, as in case of Barclay and Gordon. A distinction ought to be drawn between what was preceding to the condescendence, and what after. No apology can be made for the condescendence. Even as to that part of the expenses, Mr. Baillie had information as to the matter that led him to proceed."

PRESIDENT.—"The question is, whether the husband be liable for expenses awarded against his wife, in an action of damages *ex delicto*? I am of opinion that the husband was liable for the damages. This, the law of England as well as the civil law, and founded on principle, because, whenever a wife's person is bound for a debt, the execution *stante matrimonio* must be, not against her person, but against that of the husband, *e. g.* case of an heritable bond with a personal obligation. If granted after marriage, personal obligation null. If before good, and will receive execution against husband.

"As to expenses of suit, the husband is something more than the curator of the wife. He acquires by marriage a power over the person and estate of the wife. Her person is sunk, and she cannot act except through him. She has nothing that can be called her own, except the fee of her heritable estate, subject to his management, the rents or interest being his property. She does not act as a minor does, with consent of the curator, except in matters relating to the fee of her estate. In every other respect, and consequently in all personal matters, and in all things relative to goods in communion, or in rents of estate, the husband alone is the actor.

"In the case of a minor, the curator acts not for himself but for the ward; but husband acts for himself as well as for wife, in all matters relative to common estate. He is *præpositus negotiis*, and in some respects *owner*. He has more ample powers than the acting partner in *society*.

"It is not enough to call him in a suit edictally. He must be called specially, and when called for his interest, or when he insists in any suit for self and wife, he has the sole management and direction of it. He may proceed or abandon it, or state his defences in any manner he pleases, and it is not his duty to insist either in a bad action, or in a bad defence.

"When costs are given in any such suit, though relating to the wife's property, a debt is thereby constituted, which must be made effectual, and, whatever the nature of the action may be, it cannot be said that the demand of costs arises *ex delicto*, unless in so far as it is a wrong in the husband to maintain an improper suit or defence, which suit is imputable to him more than to the wife. The husband lays out the expense on one side, without recourse

Pleaded for the Appellant.—By the law of Scotland, the husband is not liable for the consequences of his wife's delicts, or any obligation following as a consequence therefrom. These can only affect her separate estate, unless, as Mr. Erskine says, p. 95, he be convicted of accession to the crime or delict which produced the obligation. Accordingly the Court found, in this very interlocutor, that the appellant's person and effects cannot be affected for the sums awarded in name of *damages* and *fine*; but the costs in which she is condemned, being in fact in the nature of *damages*, the same principle ought to govern, as there is no solid distinction between them. The reason of this is obvious. The appellant acted in this suit merely *curatorio nomine*, and therefore ought not to be subject in costs, unless he was blameable in the defence set up—guilty of impropriety in its conduct, or exceeded the strict line of his duty, neither of which has he been found to have done.

Pleaded for the Respondent.—The question is, Whether, when costs are awarded against the wife, in an action against her and her husband for his interest, the decree in which declares him personally liable therein, execution cannot go out against the person and effects of the husband? Against the person of the wife it cannot go *stante matrimonio*, and her effects, while under coverture, are her husband's, so that, unless execution is allowed against the husband for these expenses, the decree on that point is abortive. That the husband is liable, is manifest from many considerations. He made himself a party by his defence, and as a party he ought to be liable. It was not compulsory on him to appear in the action along with his wife; he might have declined his name and concurrence, and in that case a curator *ad litem* would have been appointed. His appearance was therefore voluntary, and every step of the procedure must have had his concurrence, just because it is reasonable to presume that a married woman is guided by her husband's advice. But the pleadings in Court in regard to him assumed a double character; they were FOR HIMSELF, and FOR HIS

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against the wife's estate.—He has an interest to defend the goods in communion from being liable even eventually. Besides, there is a charge of recrimination. I do not inquire whether he conducted himself improperly or not; but go upon this, that expenses have been found due."

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 BAILLIE
 v.
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INTEREST, that is as curator; he therefore took the consequences *on himself* personally, distinct from his office. In the conduct of the defences for himself, he pleaded that common report was a justification of slander. He pleaded next *compensatio injuriæ*, and attempted to prove it; and lastly, stated the plea of *veritas convicii*.

After hearing counsel,

LORD CHANCELLOR THURLOW said :—

“ MY LORDS,

“ Though I approve of the expediency of this decision, yet it was contrary to the law of Scotland. But, taking this case on its own bottom, here was an action brought for a most malignant charge. The defences made, which must be attributed to the appellant as *dominus litis*, aggravated that charge. At every step this malignancy seems to increase. He says he offered apologies—they were insults,—they were properly rejected. He says, in many steps of the cause he was successful. True,—but successful in getting leave to prove, what he must be held to have known he could not prove. He was right in his law; but the very plea, the offer to prove, was a fresh and cruel injury.

“ I am therefore of opinion that he must pay costs, in so far as he has blameably and maliciously conducted this defence; but I cannot say the costs generally, for part of the proceedings in defence may have been innocent. He ought to pay the costs occasioned by his own calumny, and that must be a great part; for every calumny and impropriety in the conduct of the cause is, and must be imputable to him.—But, in other respects, I move to reverse as follows.”

It was “ ordered that the part of the interlocutor complained of be *reversed*, in so far as it finds generally
 “ that James Baillie is personally liable to Mrs. Elizabeth Chalmers for £688 of expenses of process and
 “ extract, which Helen Douglas was decerned to pay
 “ to the pursuers. But it is declared that the said
 “ James Baillie is responsible for the conduct of the
 “ cause, in so far as the same was malicious, vexatious,
 “ and calumnious. And it is ordered that the cause be
 “ remitted back to the Court of Session to inquire how
 “ much of the said sum of £688 of expenses of process
 “ and extract has been occasioned by the conduct of the
 “ defender in the said cause.”

For Appellant, *Alex. Wight, W. Tait.*

For Respondent, *Sir J. Scott, W. Adam.*

PATRICK LAING, Tanner in Brechin, *Appellant* ;
 JAMES WATSON, Merchant in Brechin, and } *Respondents.*
 THOMAS MOLLISON,

1791.
 —————
 LAING
 v.
 WATSON, &c.

House of Lords, April 1791.

WRONGOUS IMPRISONMENT—FUGÆ WARRANT.—Circumstances in which creditor and magistrate, held liable in damages for irregularities in the proceedings adopted against a debtor, under a *fugæ warrant*, whereby he was imprisoned.

This was an action raised by the appellant against the respondents, for damages on account of wrongous imprisonment under a *fugæ warrant*.

The respondent, Watson the creditor, applied to Mollison, Provost of Brechin, for the warrant, upon the declaration that Laing, his debtor, was about leaving the country. Warrant was granted, and he imprisoned under it. The grounds on which damages were sought, were : 1. That when the petition for warrant was presented to Provost Mollison, the name and designation of James Watson were not inserted therein ; and that the warrant was granted and put in execution in this imperfect state. 2. No regular ground of debt, nor evidence of debt was produced to Provost Mollison ; and the respondent Watson did not make oath to the truth or *existence of any debt*. 3. The petition did not set forth that the appellant intended to leave the kingdom, on purpose to defraud his creditors, while the fact was well known to Watson that he was only going to Edinburgh to reside ; and, 4. The warrant did not order the party to be brought before him *for examination*, but ordained him *forthwith to be imprisoned*.

After some discussion in the Court of Session their Lordships, of this date, pronounced an interlocutor, finding Watson Dec. 19. 1789. and Mollison liable in damages and expenses:—" But, before
 " answer as to the quantum thereof, ordain a condescendence
 " of the damages, and account of expenses to be given into
 " Court."*

* **NOTE.**—Opinions of the Judges ; taken from President Campbell's Session Papers, Vol. lvi.

LORD MONBODDO.—" No document of debt even produced. No oath to verity, and no oath in proper terms of *meditatione fugæ warrants*. I am clear that damages are due."

LORD HAILES.—" Doubt of the propriety of Justice of the Peace acting in such matters, but proceedings otherwise totally irregular.

1791. The appellant gave in his condescendence, containing an account of his damages and account of expenses, amounting in all to £151. 14s. 4d.

LAING
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WATSON, &c.
Mar. 2, 1790.

The Court, of this date, thereupon modified the damages

My only difficulty is, Why did he continue so long in prison,—his man of business, I fancy, saw that he could make more by staying in, than by making pumps.”

LORD GARDENSTONE.—“ This is a case of importance as it relates to the duty of inferior judges, and the risks which they run ; and, on the other hand, the liberty of the subject. I should not think it enough that the document of debt was produced. Neither perhaps is it absolutely necessary that there should be an oath to the verity of the debt. Neither is it necessary to bring the person of the debtor before him—neither is the want of limitation in point of time material, where in fact action was soon after brought. But there is one ground clear in this case. Vide Erskine. If a judge not only gives his opinion, but acts,—if he stretches out his hand, he is answerable. Besides, suppose every thing regular as to the judge.—Watson had no ground for supposing that he was *in meditatione* to leave the kingdom.”

LORD ESKGROVE.—“ It is clear as to Watson, that even if he swore in proper time, he was bound to justify his conduct afterwards. If he has no document of debt, he must at least swear grounds *subjectum materiam*, that his demand is well founded.”

LORD SWINTON.—“ I feel a difficulty as to the judge. He is not answerable for wrong opinion. It must appear that he proceeds *ex dolo*, see Stair’s description of *meditatione fugæ*. The judge must have a discretionary power. A considerate judge may do one thing, an inconsiderate judge another thing. Case of List and Baillie judges were divided.”

PRESIDENT.—“ The proceedings were highly irregular, and therefore imprisonment illegal. No oath to debt. No document produced. No oath in proper terms to *meditatione fugæ*. No limitation in point of time as to cautionary. The judge is responsible as well as the private party. In cases of patrimonial damage, excuses of error, and *bona fides* have sometimes been admitted. But not in cases of false imprisonment. The liberty of the subject is so secured that it cannot be violated with impunity even by mistake. See Dict. vol. iii. voce ‘ Wrongous Imprisonment.’ The law admits of no probable cause in such a case. Certain precise forms are established by law or custom, which every judge must observe in granting warrants of imprisonment. If he neglects these, he acts at his peril. In the present case, however, there are circumstances which may be considered in extenuation.”

“ Both equally guilty—interlocutor right.—Adhere, and find pursuer entitled to £120 of damages, and expenses.”

and expenses to the sum of one hundred and twenty pounds. 1791.

Dissatisfied with this modification of the damages, the present appeal was brought to the House of Lords. **LIVINGSTONE**

After hearing counsel, it was **v.**
Ordered and adjudged that the interlocutors be affirmed. **EARL OF BREADALBANE**

For Appellant, *Wm. Adam, Ar. Cullen.*

For Respondents, *Alex. Wight.*

[M. 4999.]

THOMAS LIVINGSTONE, Esq., of Parkhall, *Appellant ;*
JOHN, EARL of BREADALBANE, . . . *Respondent.*

House of Lords, 13th April 1791.

GAME—RIGHT OF SHOOTING IN ANOTHER'S GROUNDS.—Held, that there was no law which entitled a person to enter the uninclosed grounds of another proprietor to shoot game, although the game itself was *res nullius*, and common to all ; as this did not prevent the owner of the ground from debarring all and sundry from entering his grounds, to the prejudice of his exclusive right of property.

The question which arises in this appeal is, Whether by the law of Scotland the proprietor of an estate has a right to monopolize the game upon that estate for the use of himself and particular friends, and to exclude all gentlemen legally qualified from following that amusement over his *waste* and other grounds not specially protected by any particular statute ?

The facts out of which this question arose are : That the appellant, along with a friend, made an excursion to the Highlands of Perthshire, for the purpose of enjoying a few days shooting. They took up their residence in the neighbourhood of Glenquoich, where there is an extensive range of open uncultivated hills belonging to the respondent. They were duly licensed, and the appellant had the necessary land qualification, but had no consent to shoot from the proprietor ; and thus they continued for several days shooting the game on these hills.

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 An action of declarator and damages was brought by the respondent, to have it found that the appellant has no right to come on his grounds and to follow, shoot, and kill game, and to have him interdicted and prohibited in all time coming from coming on the respondent's grounds for like purpose in prejudice of his exclusive right and privilege over the game on these grounds.

The respondent also brought a suspension and interdict, which was conjoined with the declarator.

Aug. 11, 1789. The Lord Ordinary (Monboddo) pronounced this interlocutor: "Assoilzies the defender, Thomas Livingstone, from the conclusions of the libel of declarator at the instance of the Earl of Breadalbane; but continues the interdict at his instance against the said Thomas Livingstone, and decerns; finds no expenses due to either party." On Dec. 2, 1789. representation, the Lord Ordinary recalled the interdict against Thomas Livingstone, and reserved consideration of expenses till the issue of the cause.

June 16, 1790. On reclaiming petition to the whole Lords, they pronounced this interlocutor: "Find that the defender has no right to come upon the pursuer's grounds, or search, range for, shoot at, or kill the game thereon, without the leave of the pursuer, and decern and declare accordingly; and in the process of suspension, suspended the letters simpliciter, renew the interdict, and continue the same in all time coming, and decern: Further, find the defender liable in expenses to the pursuer."*

* Opinions of Judges:—

LORD JUSTICE CLERK.—"I am entitled to say to all such persons, 'Sir, there is no road there.' I will keep him off by force if I can; and if not, will sue for damages, if I can qualify them. The statutes do not confer a new right, but are of the nature of prohibitory statutes."

LORD HAILES.—"I am of the same opinion. Although the penalties are inflicted in the case of inclosed grounds, it does not follow that it is lawful to go upon uninclosed grounds, without the owner's consent. Is it enough to say, I have a hawk upon my fist, or a gun over my shoulder, to entitle such a person to go on another's grounds? He may be stopt, if the owner have not consented."

LORD DUNSINNAN.—"I am of the same opinion."

LORD ANKERVILLE.—"I am of the same opinion."

LORD MONBODDO.—"The Roman law is out of the question here. It is a matter of public law and policy. And the object of the

Against this last interlocutor the present appeal was brought to the House of Lords.

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Pleaded for the Appellant.—Every animal which is the object of hunting and fowling, being *feræ naturæ*, and in-

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statutes regarding hunting, &c. was, to keep our bodies from becoming effeminate.”

LORD ESKGROVE.—“ Right on neighbour’s ground. It would be making all the small proprietors slaves. May be tied up himself ; but he is entitled to turn off the greatest lord when he comes on his estate. If the public has a right, how can the proprietor debar him ?”

LORD GARDENSTONE.—“ Same opinion. A man that is qualified may hunt any where *without leave*, and not liable to *penalties*.”

LORD SWINTON.—“ There is no property in game, but right of hunting may be exclusive. Damages for infringement, or, in case of penal nature, there may be the *actio injuriarum*.”

LORD ROCKVILLE.—“ Of same opinion.”

LORD PRESIDENT.—“ This is a question upon the Game Laws. It never can be said that game is *property*, without actual *possession* ; but every man is proprietor of his *grounds*, and entitled to the exclusive possession of them, if subject to no servitude.

“ The question is, Whether there be any thing in the nature of game, or in the laws relative to it, which gives to other men a common use or possession of my estate for the purpose of hunting, or fowling, or fishing upon it ? No man can claim a road or passage through another man’s property, even for the purpose of going to church, without a servitude, far less for amusement of any kind, however necessary for health. He cannot, without the proprietor’s leave, insist to range through his grounds in quest of hidden treasures or precious stones, &c. though these last are said to be *res nullius quo cedunt occupanti*.

“ So soon as property is established, every man becomes entitled to the exclusive right of exercising it, nisi lex vel conventio, vel testatoris voluntas obsistat.

“ The fish running in any stream are the property of nobody till caught, any more than the *aqua profluens*, or the air, or birds flying in the air ; but the banks of the river, and even the *solum* of it, may be private, and may be defended against any encroachment or access whatever.

“ The texts of the civil law are clear upon this head, and all the writers on that law.

“ The law of England fully explained by Blackstone ; and the respondent (appellant) has not been able to show an authority in his favour from the law of any other country.

“ The law of Scotland, is founded partly on the civil and partly on

1791. capable of appropriation, is common to all mankind. It has
 therefore been held, in the original state of society, that as
 LIVINGSTONE they were the property of no individual, the right of seizing
 v. them, or, in other words, the right of hunting them belong-
 EARL OF ed *de jure* to all parties without distinction.
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the feudal law ; and neither of these are favourable to his claim. By the principles of the feudal law, all territorial rights flow from the sovereign. Some pass as part and pertinent of lands, others require express grant, being *inter regalia minora*, such as salmon fishery. The common rights of fowling and fishing are in every charter along with other enumerations which are pertinent of land-property; and the charter always means to give such rights *exclusively* to the grantee, unless there be some special qualification or exception. When a commonty alone is meant to be given, this is expressed, or it must be acquired as part and pertinent of some other estate, by prescription or by special contract. It is not usual for charters to grant rights which are common to all mankind, such as walking along a high road, or sailing in the sea. It would be nugatory to grant such privileges by a charter.

Balfour, p.
140, c. 18,
and p. 141,
c. 19.

“ The old authority referred to in Balfour is not conclusive, every other authority, ancient and modern, stands clearly the other way.

“ Doubt if there be at present any qualification, the act 1685 being out of the question, and the act 1621 considered as obsolete even in Sir George M’Kenzie’s time, though now it is thought otherwise ; but it is well observed by Blackstone, that the statutory regulations in general, were not meant as qualifications in the sense contended for by the respondent (appellant). They were generally meant to provide against poaching, and to preserve game from being destroyed at certain times and in certain ways, or by low people, and to inflict penalties, as an easier mode of redress, in certain cases, than the common law action of trespass or damages. But there is no statute which either says or implies, *that exclusive rights shall be made common*, or means in any degree to affect the great and fundamental question of right of property at common law.

“ If the defender (appellant) can show that he and all others are entitled at common law to a promiscuous use of the pursuer’s (respondent’s) estate, for hunting and fowling, no statute exists which can be construed to take that right from him ; but if he has not that right at common law, no statute exists under which he can lay claim to it.

“ Neither does *expediency* require that the rights of hunting should be made common. It is better that any interference with the property of another, should rest upon courtesy and good will, than upon compulsion. If it be declared lawful for every man, who has a ploughgate of land, to enter upon his neighbour’s grounds with horses, and

By the Roman law, all animals *feræ naturæ* became the property of him by whom they were seized, whether taken on his own ground or within that of any other: and although by that law every landholder was entitled to forbid all other persons from hunting or fowling on his estate, yet what was taken there became equally the property of the hunter or fowler, as if he had kept within the limits of his own territory; and it was only competent for his neighbour to have an *actio injuriarum*. So laid down by Vinnius and by Voet, v. 2. 1, p. 721.

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The more modern states of Europe have, in general, departed considerably from the Roman law, in limiting this natural right of mankind, by various modifications, defining to what particular persons the privilege of hunting was to be permitted, and in what manner it was to be exercised; so that in this and some other countries, the power of appropriating wild animals by occupation, which *jure gentium*, was common to all, came to be *inter regalia*, and communicable only by special grant from the sovereign; and in others, to be enjoyed only by persons of a particular rank, or by owners of a certain extent of land, *per modum privilegi*.

In Scotland, the right of hunting has always been an important object of public polity, which it was the business of

dogs, and attendants, or even alone and on foot, in quest of game, without leave asked or given, it is probable he will meet with many difficulties and obstructions, and perhaps methods will be taken to prevent even the existence of game upon that property, whereas the contrary will be the effect of allowing every man to be the master of his own property, and to give such indulgences to others as he may be disposed to allow. This argument had a good deal of effect in the case of the Marquis of Tweeddale, (see Sess. Papers, vol. 34, No. 63, see also *Kelly v. Smith*, 27 June 1780.) Besides, if the claim is limited to the case of open grounds, it may easily be evaded by the slightest inclosure, such as a few turfs laid upon one another, called in Scotland a feal dyke.

“The very circumstance of limiting the claim in that manner, shows that it does not exist: for if there be such a common property, or right to the killing of game, upon what principle should any individual be entitled to limit or exclude that right, by inclosing his grounds? If every proprietor in Scotland follows this course, what becomes of the common right of hunting?”

LORD HENDERLAND.—“Of same opinion.”

From Lord President Campbell's Session Papers, lviii.

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the legislature to regulate in such a way as to encourage and preserve among the nobility and gentry a taste for those manly exercises which were supposed to be the likeliest means of keeping alive their martial spirit. The multiplicity of statutes on this subject demonstrate this.

It will be found, that through the whole of these statutes the legislature had in view, 1. To preserve the game, by fixing certain limitations, both as to the time and manner of killing; and, 2. To prevent an amusement, which although permitted to all indiscriminately, it was afterwards judged proper to make the exclusive privilege of the nobility and gentry, as being more suited to their station in life. Although landed property, to a certain extent, is now essential towards qualifying a person to hunt or fowl, yet the exercise of this right is understood to be general, and to extend over the whole country, wherever game is to be found. It accordingly appears that from the earliest period of the law of Scotland, this general right of hunting on the grounds of other men, (except in the case of animals enclosed in a park or warren, which in some respects were private property,) hath been considered incontrovertible.

The 52d chapter of the Form and Manner of Holding Baron Courts, says, That in the time of King Alexander, “ Na manner of waters were defended from fishing of salmon but waters runnand to the sea, nor zet was not defended nor forbidden to any man to hunt, nor to chase the hare and the fox, and other wild beasts, without forests and warrandes quheresoever they were founden;” and President Balfour, in his Practicks, quotes the above treatise as legal authority. “ Item, It is leisome to all men to chaise hares, foxes, and all other beasts, beand without forests, warrens, parks, or wards.”

The first restriction in the killing of game is the 10th chap. of Robert the III., which forbids the killing of hares in the time of snow. The next statute is that of 19 James I. anno 1424, cap. 36, whereby a fine is imposed on stalkers. In the same king’s reign, it was enacted, 1427, cap. 108, “ That na patricks, plovers, black cocks, gray hens, na mure cocks, nor such fowls, be tane with na manner of instrument, fra the beginning of Lentròn quhil August, under the pain of 40s.”

The act 1474, cap. 60, is the first which introduced any prohibition with respect to the killing of game. It enacts, “ That na man slaie daes nor raes nor deare, in time of

“ storm or snow, or slaie any of their kiddes, under the
 “ paine of x pundis ; and that na man hunt, schute, nor slaie
 “ deares nor raes in otheres closes or parkes, &c. under the
 “ paine of punishment of theft.” There is, however, no
 prohibition in this act in respect to hunting or shooting in
 open grounds, at the proper season of the year, because
 the legislature held that to be competent to all subjects.

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The like conclusion is to be drawn from the statute 1535, cap. 13. From the preamble of the act 1551, cap. 9, it appears that a great many deer, roe, wild beasts, and wild fowls, had been killed by shooting at them with particular instruments, to wit, half-hag, culvering, and pistolet, to the great hindrance of the noblemen of the realm's getting the pastime of hawking and hunting, and accordingly such manner of killing game was prohibited, “ under the pain of death.” But Sir George Mackenzie, in his Observations, says, “ that this act, inflicting the pain of death, and confiscation of moveables upon such as shoot deer, wild fowl, “ or wild beasts, is deservedly in desuetude.”

The act 1555, cap. 51, is of still greater importance to the present question, for it provides specially that no man will go into his neighbour's grounds, hunting or hawking, when the corn is on the ground, nor go into wheat fields at these times of the year, till the same be cut down ; thus showing that the right otherwise was so absolute and undoubted as to require an enactment to restrain it, and to prevent coming on the grounds even while the corn was still uncut.

The act 1621, c. 31, enacts that “ no man hunt nor hawk “ at any time hereafter, who hath not a ploughgate of land “ in heritage, under the pain of £100.”

By the act 1685, c. 20, all persons except those heritors who are possessed of £1000 of valued rent, and had an express license from the masters of the game, were prohibited from killing game with setting dogs. But it is now a settled point that this act was never in observance since the Union, and is therefore in desuetude.

The last statute passed in the parliament of Scotland relative to this subject, is the act 1707, c. 13, which, after pointing out the season during which game might be killed, and the penalty attending a breach of the enactment, proceeds to enact, “ That no common fowler shall presume to “ hunt on any grounds without a subscribed warrant from “ the proprietor of the said grounds, under the penalty “ foresaid, besides forfeiting their dogs, guns, and nets, to

1791. " the apprehenders or discoverers : And it is further pro-
 vided, That no fowler *or any other person whatever*, shall
 LIVINGSTONE " come within any heritor's grounds, without leave asked
 v. " and given by the heritor, *with setting dogs and nets*, for
 EARL OF " killing fowls by *nets* ; and if any common fowler shall be
 BREADALBANE " found in any place with guns and nets, having no license
 " from the nobleman or heritor, they shall be sent abroad as
 " recruits."

From all these statutes, it clearly appears that it has been the constant understanding of the legislature, during the course of several centuries, that no landowner could prevent a person duly qualified from hunting or killing game on his open and unenclosed grounds not under crop. The appellant found himself in possession of an estate of the required value, handed down to him by his ancestors, one invaluable franchise appertaining to which he understood to be, the privilege of hunting and killing game. And as none of the acts above quoted refer to waste or hill grounds, he conceived that he was exercising a legal right in shooting over the grounds in question.

Pleaded for the Respondent.—It is an established principle, founded in the very nature of property, that every man is entitled to the exclusive possession of his own property, and to debar all others from entering upon it for any purpose, unless when the owner is laid under restraint by special statutes, or another has acquired a privilege of servitude by grant or prescription, or where the public safety may require ; as in pursuing criminals, or destroying noxious and dangerous animals. The animals which come under the description of game, being *feræ naturæ*, are held in the law of Scotland, as in the Roman law, to be *res nullius*, and to belong to the occupier ; but although the property of them, when killed, belongs to *the killer*, it does not follow, that every person is entitled to search for, pursue, or kill those animals, upon the soil of another, in order to acquire such property. There is no proper connection between the premises and that conclusion. By the Roman law, the right of killing was free to all ; but it strictly preserved the rights of the owner of the soil from being encroached on for that purpose.

Such also is the law of Scotland : Stair says, " Cum occupationibus venationibus," signify privilege to kill fowls, " fishes, and wild beasts upon the owner's grounds, from which he may *debar* others entirely, by hindering them to

“ come upon the ground. But the vassal hath no property
 “ in the wild beasts, fowls, or fishes, which belong to none,
 “ for they are proper, only by excluding others to come
 “ upon the ground, the vassal having the sole occasion of
 “ taking such as are *found* there.” Lord Bankton speaks to
 the same purpose.

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Mr. Erskine, after laying it down :—“ That the right of
 “ hunting, fowling, and fishing, within one’s own ground,
 “ naturally arises from one’s property in the lands, but is
 “ restricted by sundry statutes,” adds, “ *It has lately been*
 “ *made a doubt*, whether a person qualified to kill game
 “ may hunt or shoot within another man’s property without
 “ a trespass. Indeed the act 1707, c. 13, which prohibits
 “ all, without exception, to come within their neighbour’s
 “ property with setting dogs and nets, without the proprie-
 “ tor’s consent, seems to take for granted, that a person
 “ qualified may hunt on any ground with hounds or grey-
 “ hounds, or shoot with a fowling piece; provided he does
 “ not use a net. But surely such privilege carries with it a
 “ most severe limitation upon property, and, besides, hath a
 “ manifest tendency to destroy the game.”

The appellant attempts to maintain, that, according to
 the earliest writers on the law of Scotland, the general right
 of hunting upon the grounds of others (except in the case of
 parks and warrens) is clear and incontrovertible; but the
 single authority he quotes is that of President Balfour. But
 as Balfour states this upon the authority merely of *The*
Forms of Barons Courts, a treatise destitute of any legal
 authority whatever, no regard can be paid to it.

None of the statutes respecting the game take away or
 infringe the right which an owner has at common law, to
 prevent others from coming on his property. The general
 object of the statutes was, the preservation of the game, by
 laying down regulations as to the time and manner of kill-
 ing the animals which came under that description, and also
 as to the persons to whom this right was allowed. Of such
 a nature is the statute 1555, c. 51, founded on by the appel-
 lant. The subsequent acts also, specially commented on by
 the appellant, are of a similar nature, and to a like object.
 From all these statutes, there is nothing to warrant the con-
 clusion that owners of land are not entitled to the exclusive
 right of their property, and to debar all others whatever
 from entering and encroaching on their grounds for any
 purpose whatever, much less for the purpose of killing

1791. game. Such indeed is a breach of the law. It is an act of trespass, punishable in a criminal manner.

MAGISTRATES
OF ANNAN
v.
SHORTREID,
&c. After hearing counsel, it was
Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *T. Erskine, Alex. Wight.*
For Respondent, *J. Anstruther, Tho. Macdonald.*

THE MAGISTRATES of the Burgh of Annan, *Appellants ;*
MRS. NANCY SHORTREID OR JOHNSTONE, }
Widow of the late William Johnstone, } *Respondent.*
Writer to the Signet, . . . }

House of Lords, 15th April 1791.

IMPRISONMENT OF DEBTOR—LIABILITY OF MAGISTRATES.—A messenger having apprehended his debtor, and given him to the Lord Provost of the burgh, for the purpose of having him imprisoned in the common jail. Instead of this, he was put into a room adjacent to the court room, where he enjoyed the privilege of open jail. Held, that the magistrates were liable in payment of the debt, for not instantly incarcerating the debtor in the common prison.

This was an action raised by the respondent against the provost and magistrates of Annan, for not having properly incarcerated her debtor, after he was handed over to the provost by a messenger at arms for that purpose, the said debtor having been apprehended under a caption for a sum of £1326. at her instance ; and instead of being put at once into the common jail or prison of Annan, he was kept and detained all night at an inn or tavern, being part of the evening under the charge of the provost, and part left to himself unguarded,—the provost having left him at ten o'clock at night until breakfast time next morning ; and then only put him into a room adjacent to the court room, and not into the common jail, under lock and key, which was giving the prisoner, what was called in Annan the privilege of open jail.

The party apprehended was the sheriff-depute of the county of Dumfries ; and the reason why he was not put in the jail was, as alleged by the provost, that there was no fitting accommodation for the prisoner there—it being full. The debtor sometime thereafter took out cessio ; and, on its being opposed by the respondent, she consented to with-

draw her opposition on receiving £400, being part payment of her debt. Whereupon it was a defence stated in this action, that having consented to liberate him in the cessio, she had virtually abandoned her plea of illegal imprisonment.

The Court of Session found the provost and magistrates liable in the debt for which the party was apprehended.*

Against these interlocutors the present appeal was brought.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *Sir J. Scott, Wm. Tait.*

For Respondent, *T. Erskine, W. Grant.*

1791.

MAGISTRATES
OF ANNAN

v.

SHORTREID,
&c.

June 8, 1790.

24, —

July 8, —

9, —

Dec. 7, —

* Opinions of Judges:—

LORD PRESIDENT (CAMPBELL).—“ This is an action against magistrates for not having duly confined a prisoner.

“ 1. The first ground is, that he was not imprisoned until near 24 hours after being delivered into the hands of the provost. No detention during the night. The prisoner was left entirely to himself from about 10 o'clock at night, when he went into his bed room, till next morning at breakfast, when provost came again to the inn. No guard or other precaution.

“ If kept in private custody, which may be allowed for a reasonable time, the prisoner must be watched and guarded. Whereas Mr. Armstrong was at full liberty for 10 or 12 hours. It is not enough to say that he did not go away, for he might have done so if he pleased, and was not in custody at all during that time.

“ It is of no consequence that the magistrates were not charged to detain him. The provost's receipt for his body was equivalent. It was of no consequence whether this was at the hour of six or at the hour of ten o'clock ; and no matter what conversation the provost held about time of committing him to prison. The messenger did his duty, and left it to the provost to do as he pleased afterwards.

“ This ground, therefore, for subjecting the defenders (magistrates) seems to be conclusive, and not affected by the proceedings in the *cessio bonorum*.

“ 2. Ground. The privilege of OPEN JAIL, as explained by practice at Annan, is illegal. Law does not require that a debtor should be closely confined to this or that particular apartment in prison, but certainly requires being locked up within the prison walls, so as that the prisoner shall not, by merely opening the latch of a door, go out into the street if he pleases.

“ Had the outer doors of the prison been kept locked through the day as well as the night, or had he been locked into an inner apart-

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LAIRD
v.
ROBERTSON,
&c.

[Mor. p. 7099.]

JOHN LAIRD, *Appellant ;*
MESSRS. ROBERTSON & Co. *Respondents.*

House of Lords, 20th April 1791.

INSURANCE—DEVIATION.—A vessel was insured from Virginia to Rotterdam, “with liberty to call at a port in England.” She sailed direct for Hull, and was lost on her voyage to that port. Held by the Court of Session, that a voyage from Virginia to Rotterdam, with liberty to call at a port in England, gave a liberty to call at any port in England, and therefore to call at Hull. Reversed in the House of Lords, and case remitted to pass the bill.

This was an insurance made of a ship and cargo from Virginia to Rotterdam, “with liberty to call at a port in

ment, when there was a necessity of opening the outer door, and using the court house, or other outer apartments, no harm would have been done. A prison may be so constructed as that a court house, under the same roof, shall occasionally be used as part of the prison, and occasionally not.—But here Mr. Armstrong was allowed himself to use the court room when it was quite open, and the outer doors unlocked, to give free ingress and egress to suitors and others. Allowing him to sit as judge, and pronounce judgments in prison, was highly indecent. In fact, he was not then in prison, but in the court house when it was not a prison ; and he was at all other times, from morning to night, at liberty, because there was no locked door upon him either above or below ; and even in the night time he might have gone out at the window of the court house, upon which there were no iron bars nor guards without.

“ No local practice can sanctify this, being against the law of the land. The practice at Dumfries different ; for the magistrates take care to have a broader security to indemnify them in all events, whether he goes out of prison or not. But those who grant such a cautionary, are not perhaps aware of their danger.

“ The practice of the burgh of Prestwick, where the prisoner keeps the key, and forfeits his freedom if he comes out. This may be a good security, but it is not legal imprisonment.

“ The late case of the magistrates of Edinburgh, who were found liable, though the prisoner had obtained *cessio bonorum*, the decree

England." After the policy was drawn out, information was received that the vessel was not to go to Rotterdam, but to discharge at Hull in England. The insured obtained an indorsement on the policy to that effect, signed by all the insurers except the appellant, who declined.

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&c.

not being extracted. The rules of law cannot be got over in such cases.

"But a separate question occurs here, whether by the transaction in the *cessio bonorum*, the pursuer did not virtually give up her plea of illegal imprisonment? She had actually stated to the Court that Mr. A. was not legally imprisoned. This she ought to have stuck to; but, upon a compromise, she received £320 to pass from the objection, and to admit that he was in legal durance. This seems to bar her *personali exceptione* from recurring to that plea in the present shape, especially as the present action is subsidiary, and if she prevails, she is bound to make over her claim against Mr. A. to the magistrates. She ought therefore not to have consented to his liberation, but given them an opportunity of detaining him in prison.

"This brings the cause back to the first point, and I doubt if it can be affected by the proceedings in the *cessio*, for it does not appear that the pursuer was then in the knowledge of Mr. Armstrong's situation during the first night, and supposing the fact to have been known, yet if he was afterwards legally a month in prison, this was enough for the *cessio*.

"It ought to be inquired into, what right the pursuer has to the bill in question, for it was originally the money of Hunter of Clerkington and his creditors.

"Even as to the second point, I doubt, upon consideration, if it be a bar to the pursuer's present plea, that she withdrew her opposition to the *cessio*. She was not bound to defend at all against the *cessio*. She might have betaken herself at once to her demand against the magistrates; and it is so much the better for them that she has got payment of so much of the debt."

LORD HAILES.—"The imprisonment was illegal in both respects (points.)

LORD MONBODDO.—"No law requires that a debtor should be immediately imprisoned. If he had made his escape from the public house, the magistrates would have been liable, but not otherwise. As to the other objection, it is not necessary to confine a prisoner to any particular room. He may have the liberty of the whole prison."

LORD SWINTON.—"Of first opinion," (President Campbell's.)

LORD JUSTICE CLERK.—"The magistrates, as keepers of the prison, have no *judicative* powers. Their powers are merely *ministerial*. No apology afforded here. The provost ought to have committed

1791. The vessel was lost on her voyage, and action was raised before the Court of Admiralty against the appellant for his part of the sum assured, and decree obtained. He offered a bill of suspension, arguing that, as the policy stood originally, and by which only he could be bound, the voyage insured was different from that on which the vessel sailed. It was answered, that the original policy contained liberty to call at a port in England, and that *a port* meant *any port* in England. The Lord Ordinary refused the bill of suspension, and, on reclaiming note, the Court adhered.*

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June 2, 1790.
Nov. 16, —

him immediately. Duresse of imprisonment depends on the compulsion."

LORD ROCKVILLE.—"Of the same opinion."

LORD GARDENSTONE.—"The interlocutor is well founded. The act of Sederunt 16 February, speaks only of *escaping out of prison*. (N.B. This subjects them, even where there is a legal imprisonment, and an escape by violence, unless there be a particular precaution used by locked fast doors, besides watching. Vide also act 1701. Close imprisonment discharged.)"

LORD HENDERLAND.—"There was no imprisonment here at all. Courts must be held with open doors; and if the prisoner was allowed free liberty to hold courts, it cannot be said he was properly imprisoned. In order to this, there must be a restraint both on the body and the mind."

LORD ESKGROVE.—"The custody of the messenger was sufficient imprisonment, without actual commitment. There is no act of Parliament inflicting this penalty. See the other act of Sederunt. (N.B. This explained by decision in case of Breck in Dict. t. 2. p. 169.)"

LORD MONBODDO.—"Ought not to inflict penalties without act of Parliament or act of Sederunt."

LORD DREGHORN.—"Difficulty from bond, which was a compulsitor. I think the interlocutor should be altered so far on the second point—Whether it be a virtual discharge to her plea of illegal imprisonment, by withdrawing her appearance in the *cessio*?"

LORD JUSTICE CLERK.—"I agree with the general doctrine. But Lord Bankton carries it too far. Must not discharge the principal; but why should she be obliged to keep him in prison. Must I alimment him upon the act of grace? She may say I have good men bound to me. This case still less difficult: for here she does not liberate, but only gives up opposition."

From Lord President Campbell's Session Papers, lviii.

* LORD JUSTICE CLERK, ESKGROVE, and the other Judges, for adhering.

LORD PRESIDENT CAMPBELL (with whom was LORD HAILES) for

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The ground of the judgment below was this :—That liberty to call at a port in England implied a power to call at any port without distinction, whether such port might be in the course of the voyage to *Rotterdam* or not ; that of consequence the policy gave a power to call at Hull. And, supposing this to be the case, a liberty to discharge at Hull must also be implied, as by this means the voyage would only be shortened, and the risk lessened. But the appellant maintains that this proceeds upon a mistake, in supposing that the liberty to call at a port in England gave a power to call at any port. In all policies, the line of the voyage to be insured is specified. If it is a trading voyage, the several ports are particularly mentioned. If it is not a trading voyage, the loading and discharging ports are the points or extremes ; and the voyage insured is the usual line or course of navigation between these two. A liberty to call at other ports, sometimes in more limited, sometimes in more general terms, is given ; which is often necessary for various purposes different from the unloading the cargo. It may be for leaving or receiving advices, or to put out, or take in passengers. But these import liberty only to call at some intermediate port in the course of the voyage, lying in the usual tract between the two ports specified as the two extremes. While, on the other hand, if it be intended to call at a port, not in the course of the voyage, that port must be mentioned in the policy. In the

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altering.—The Lord President said, “ That it was a very general point, and ought to be reconsidered.—Doubt if the interlocutor right. It rather seems to have been a new voyage, and new adventure altogether ; and of course that the first policy was discharged.—Mr. Gammell himself seems to have considered the matter in that light. The argument in the petition is very strong, and is not taken off by the answers.—I am satisfied that it was a new undertaking. The change in the printed part of the policy ‘ with liberty to call at any port or place,’ is not regarded, unless a special place be named. *Vide* chapter, ‘ Deviation,’ in Park on Insurance.—Carter and Townshend. The printed clauses are little attended to.—Meant for cases of necessity.—Besides, the vessel never set out upon the voyage insured ; and no vessel would go from Hull in her way from Virginia to Rotterdam, which, in reality, would not be shortening the voyage.” *Vide* President Campbell’s Session Papers, vol. lix.

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present case, the vessel was to load at Virginia, and discharge at Rotterdam. A liberty to call at any port in England, could only be understood a liberty to call at a port in the usual course of sailing between the two extremes of Virginia and Rotterdam—in other words, to call at some port in the English Channel, such as Plymouth, Falmouth, Dover, &c.

Pleaded for the Respondents.—The vessel having been ensured from her loading ports in Virginia to Rotterdam, with leave to call at a port in England, was lost on her voyage from Virginia to Hull, a port in England. The policy covered a voyage from Virginia to any port in England, without any view of proceeding further on arriving at that port, because a voyage may be shortened without vacating the policy, the only effect of shortening a voyage being to diminish the risk; and by liberty to call at a port is implied a power of discharging the whole, or a part of the cargo, at that port. The leave, therefore, in this case, to call at a port in England, gave power to call at *any* port in England; and such was the meaning of the parties.

After hearing counsel,

LORD CHANCELLOR THURLOW said :—

“ MY LORDS,

“ It appears to me very unaccountable, that merchants will persist in using the old form of policies, which were extremely ill worded, and gave occasion to so many law-suits, which might be avoided if clear and fixed expressions were used.—In the present case, I find it impossible to construe ‘ from Virginia to Holland (Rotterdam), with liberty to *call* at a port in England,’ as giving liberty to go entirely out of the course of the voyage, and to call at Hull. If to Hull; why not to Liverpool or Whitehaven? But I need not enter deeply into the subject, because the question before the House was only,—Whether the Court of Session ought to have passed the bill of suspension? At same time, however, I believe it will *not* be an *easy* task to show, that a voyage from Virginia to Rotterdam, with liberty to call at a port in England, which was the risk undertaken by the appellant, is precisely the same thing with a voyage from Virginia to Hull, which was *that* the vessel intended and actually performed, and if the respondents did not make out that, the appellant certainly was not liable. I therefore move to reverse, and remit to pass the bill.”

It was therefore ordered and adjudged that the interlocutors complained of be reversed, and that the cause

be remitted back to the Court of Session to pass the bill of suspension.

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For Appellant, *T. Erskine, W. Adam.*

For Respondents, *Sir John Scott, W. Grant.*

ELLIOT
v.
PRINGLE.

WM. ELLIOT of Wells, Esq., one of the Free-
holders of the County of Roxburgh, } *Appellant ;*
COLONEL ROBERT PRINGLE, *Respondent.*

House of Lords, 5th March 1792.

ELECTION OF MEMBER OF PARLIAMENT—QUALIFICATION.—Held, where objection is stated to the title to be enrolled and to vote for a member of Parliament, the complaint must be followed up within four months, in terms of the act 16 Geo. II. c. 11.

The respondent was enrolled as a freeholder of the county of Roxburgh, in virtue of a conveyance to him for life of the lands of Bankhead, disposed to him by John Pringle of Clifton. The property was a part of the estate held by John Pringle under strict entail, and with strict prohibitions, &c. against alienation.

When he applied to be enrolled, it was well known, from Pringle having no power to alienate, that this qualification was fictitious, but no objection was taken at the time.

Thereafter, at a meeting of freeholders, for the purpose of electing a commissioner to serve in parliament, the appellant objected to the respondent's title as nominal and fictitious, and moved that he should take the oath, but previously that he should answer certain interrogatories, the tendency of which was to prove, by the respondent's own confession, that the qualification was fictitious.

The respondent expressed his willingness to take the oath, but declined to answer the interrogatories, because he considered the freeholders had no right to put them. It was answered, as by the case of the Aberdeenshire freeholders and Macpherson, it was determined in the House of Lords that the freeholders had a right to investigate the reality of the qualification by other means than putting the oath, he was not entitled to refuse. Reply. He was entitled to refuse, because the four months within which, by the act 16 Geo. II. c. 11, the

1792. freeholders were entitled to complain to the Court of Session have expired. The question thus came to be, Whether the freeholders have a right to object and investigate the qualification of a person upon the roll, although no complaint be lodged against his enrolment within four months?

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Dec. 8, 1790. The Lords found that the freeholders did wrong in striking the complainer off the roll; and, on reclaiming petition, —23, — they adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *S. Douglas, J. Anstruther.*

For Respondent, *W. Grant, Wm. Dundas.*

WM. SIMSON, Esq. of Viewfield,

Appellant;

The Honourable Mrs. HENRIETTA ANN
KER, Sister of the deceased JANE, Marchioness of Lothian, DOUGALD STEWART,
Professor of Moral Philosophy in the University of Edinburgh, & JOHN PITCAIRN,
Merchant there, Trustees appointed by the said deceased Marchioness of Lothian, and JOHN WM. MARQUIS OF LOTHIAN,

Respondents.

House of Lords, 28th March 1792.

SUPERIOR AND VASSAL—RETENTION OF FEU-DUTIES—DAMAGE IN WORKING COAL.—Held, in the special circumstances, that the superior was not liable for the damage sustained by his vassal, in working the coal by the proprietor, to whom the superior had conveyed the coal; but that the owner of the coal was alone liable, and therefore, that he had no right to retain the feu duties.

July 3, 1748. Lord Ross sold, and in feu farm conveyed, in consideration of the sum of £700, and the feu duty of £50, &c. per annum, the lands of Pendrieck, with the mansion house thereon, situated in the parish of Lasswade, and county of

Edinburgh; but under this reservation, “reserving to us
 “and our heirs and assignees, all and singular the mines of
 “gold, silver, copper, lead, coal, and other metals and min-
 “erals whatever (quarries of lime and stone only excepted),
 “with full power and liberty to us and our foresaids, now
 “and at all time hereafter, to search for, work out, and dis-
 “pose of to our own use, the said metals and minerals, and
 “to make use of such parts of the lands before disposed, as
 “shall be necessary for these ends, *we and our foresaids*
 “*always satisfying and paying the whole damages* which
 “the said Andrew Simson and his foresaids shall sustain
 “thereby, according as such damages shall be ascertained
 “by two indifferent persons mutually chosen.”

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Some years thereafter, Lord Ross conveyed the foresaid June 5, 1759.
 lands of Pendriech, under burden of the above feu right, to
 the late Wm. Henry, Marquis of Lothian, his heirs male of
 tailzie and provision, whom failing, to his heirs and assign-
 nees whatsoever, “together with the whole coal, metals,
 “and minerals of every kind, with full power to the said
 “Marquis to search for, work out, and dispose of to their
 “own use all such metals and minerals, and to make use of
 “such parts of the said lands as shall be necessary to those
 “ends, *he and his foresaids always satisfying the whole da-*
 “*mages which the feuars and tenant of the said lands shall*
 “sustain thereby.”

The above disposition to the Marquis of Lothian except-
 ed from the conveyance therein the said feu rights, and spe-
 cially *that* granted to the appellant’s father, and excepting
 also the tack of the coal granted to Andrew Henry.

The Marquis of Lothian having given these lands, with
 the coal, to the Marchioness of Lothian in liferent, he, of
 this date, and with consent of the Marchioness for her right May 8, 1762.
 of liferent, conveyed to John Clerk of Eldin the coal in the
 lands feued to the appellant’s father, *to be holden of and un-*
der the Marquis and his heirs or successors; and Mr. Clerk
 was taken bound in the usual way to pay the whole dama-
 ges occasioned by the working of the coal.

The coal, it appeared, came to be wrought immediately
 under the mansion house of Viewfield, and considerable da-
 mage was done to the house by rents and sets in the walls
 thereof. These were duly intimated by the appellant to
 Mr. Ainslie, the Marquis of Lothian’s factor; and at Whit-
 sunday 1782 he further gave notice of his intention to re-
 tain the feu duties of the foresaid lands in security and pay-

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ment of the damages occasioned for the working of the coal.

Action was then raised by the respondents for payment of the arrears of feu-duties due by him to the Marchioness. In defence to this action, it was contended that the Marquis, as superior, was liable for his vassal Mr. Clerk, to whom he had sold the coal, and that Mr. Clerk had wrought the coal from under the appellant's house of Viewfield, and other buildings on the lands of Pendreich; and otherwise conducted his operations below ground, in such way and manner as tended greatly to the hurt and prejudice of the appellant, and by which he had sustained great loss and damage. In reply, the respondents stated, that when the property of the coal was transferred to Mr. Clerk, the obligation to pay the damages accruing from that period, was also transferred against him, just as it had been when the superiority of the lands, with the coal, were conveyed to the Marquis by Lord Ross, so also the obligation to pay the damages was transferred against him. Accordingly, against Mr. Clerk, the appellant's father had raised legal proceedings, and had obtained decree for the sum of £236 as damages done by the working of the coal, which was a tacit confession that he alone was liable.

Jan. 31, 1789.

The Lord Ordinary pronounced this interlocutor.—“ Finds,
“ That as in the original feu right granted to Andrew Sim-
“ son, the defender's father, in 1748, there is a reservation
“ of the coal, and of full power and liberty to search for,
“ work, and dispose of the same, in favour of Lord Ross the
“ grantor, he and his foresaids always satisfying and pay-
“ ing the whole damage sustained thereby, it follows, that
“ upon the property of the coal being transferred to a third
“ party, the obligation to pay the damages was of course
“ transferred against the disponent, from the commencement
“ of his right, and the obligation on Lord Ross and his
“ heirs ceased, except as to bygones; and that, in the same
“ way, when the property of the coal, and the power of
“ working it, came, after passing through the hands of the
“ late Marquis of Lothian, to be vested in Mr. John Clerk
“ of Eldin, in consequence of his purchase from the Marquis
“ in the year 1762, the obligation to pay the damages was
“ of course transferred against Mr. Clerk, and against him
“ alone: Finds that, accordingly, from the time of Mr.
“ Clerk's purchase, it was from him that the damage was
“ claimed on account of his working the coal; and that it

“ was between the defender and Mr. Clerk alone, that first
 “ an ineffectual submission, and afterwards a tedious litigation
 “ took place, with respect to the amount of that damage;
 “ which last terminated in a decree of this Court in the year
 “ 1784, ascertaining the total amount of the damage from
 “ the year 1764 to the year 1784, and decerning Mr. Clerk
 “ to pay the same; and which sum he accordingly agreed to
 “ pay, and a discharge was wrote out, but to which his sub-
 “ scription was refused; some dispute having arisen which
 “ of the parties was entitled to the custody of the decree in
 “ the expense of extracting, which Mr. Clerk had been
 “ found liable; and which settled a variety of other points
 “ of dispute between the parties, besides the extent of the
 “ damages. Therefore, both on the general ground, and
 “ the particular circumstances of the case, repels the de-
 “ fence; finds the defender liable to the pursuers in the
 “ feu-duties libelled.”

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On representing against this interlocutor, the Lord Ordin-
 ary adhered. On representation by the respondents, the
 Lord Ordinary pronounced this interlocutor:—“ In respect
 “ that Mr. Simson insisted for his damages, first before ar-
 “ biters, and afterwards before this Court, where he obtain-
 “ ed a decree against Mr. Clerk, and against him only, with-
 “ out ever making any intimation to his superior,—that it is
 “ admitted Mr. Clerk is solvent, and that he suspended the
 “ charge given for the sum decreed for damages by his
 “ Court, singly on pretence that he was entitled to the cus-
 “ tody of the decree, and that it is plain his suspension must
 “ at any rate have been refused, had Mr. Simson so inclined,
 “ except *quoad* as much as was sufficient to pay for another
 “ extract; alters the interlocutor, in so far as it finds the de-
 “ fender liable in no other expense but that of extracting
 “ the decree; and finds him liable in the expense of process,
 “ and modifies the same, as hitherto incurred, to £10, and
 “ decerns. And as to interest now claimed, finds the de-
 “ fender liable for interest on the feu-duties libelled from
 “ the date of citation in the action, and decerns.”

Mar. 2, 1789.

The appellants presented a petition to the Court, who at
 first altered the interlocutor of the Lord Ordinary, but, on
 petition by the respondents, “ they alter the interlocutor
 “ formerly pronounced: Find that the respondent, Mr. Sim-
 “ son, is not entitled to retain the feu-duties payable by him
 “ to the superior, on account of any damage which he has
 “ sustained, or may sustain, by the working of the coal now

June 27, 1790.

1792. " belonging to Mr. Clerk of Eldin; within the respondent's
 " lands, after the commencement of Mr. Clerk's right.
 SIMSON
 v.
 KER, &c. " Therefore repel the defence made by him against payment
 " of the feu-duties." On petition to the Court against this
 Jan. 18, 1791. interlocutor the Court adhered. Then he offered a bill of
 May 31, 1791. suspension of these judgments,—the bill was refused. And,
 Feb. 2, 1791. soilzied " the Marquis of Lothian, and decerns."*

* Opinions of Judges:—

LORD PRESIDENT CAMPBELL.—" This is a question between superior and vassal, for damages sustained by working the coal, and retention of the feu duties in consequence of such damage.

" By the original principles of the feudal law, the superior could not alienate the *dominium directum* without the consent of his vassal. Craig, lib. 2, tit. 12, § 35. The power of alienation is now complete in him; but it must be a total, not a partial alienation. Hence superiors cannot be multiplied over the vassal, and a subaltern superior cannot be interposed between and the vassal without his consent.

" When the superior reserves to himself a power of working coal, or any other mineral below ground, this, although not one of the *essentialia* of the *dominium directum*, becomes one of the *accidentalia*, or, in other words, one of the rights reserved to the superior by *stipulation* out of the feu. It must, in a feudal sense, belong either to the superior or to the vassal, both of whom are infeft in the whole *dominium* of the lands, for although it may be assigned, *i. e.* the liberty may be communicated to a third party, yet such third party can only enjoy it under the granter, as a mere liberty or privilege, which he derives from him, in the same way as he would do a power of cutting down the trees, or reaping the grain upon the solum of the feu. The superior and the vassal still continued bound to one another as the two contracting parties. The feu duty is a security to the one, and the rents to the other, against all breach of the feudal contract.

" The superior and the vassal, though less intimately connected now than formerly, are still liable in mutual duties and obligations to one another; and these may be more or less extensive according to the bargain which they make. Each party may now sell his right; but the question is, Whether he must not convey it entire if he means to liberate himself from the feudal engagement. The vassal may grant a subfeu of a part; he may even sell a part to be holden *a me*, but he cannot do so without remaining bound to the superior in the whole prestations of the feu contract. Neither he nor the purchaser can insist that the feu-duty or casualty should be divided.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded by the Appellant.—By the feu charter to the appellant's father, Lord Ross, the grantor, at the same time

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“ In the same way, the superior cannot parcel out the superiority, or the prestations incumbent on the vassal, by dividing them into parts, without consent of the vassal, though he may convey the whole as a *jus individuum*, *e. g.*, suppose he should grant an assignment of the feu duties to a creditor, he still continues as much bound to his vassal in every counter prestation as if no such thing had happened, and the vassal may retain the feu duties for implement of any prestation incumbent on the superior.

“ In the present case, he has done less ;—he has only assigned one of the adventitious prestations, which he stipulated to himself out of the feu, leaving the feu duties still payable as before, which feu duties the vassal is entitled to retain, if the counter part of the obligation in the feudal contract is not made good to him.

“ The petitioner considers a stratum of coal as a *separatum tene-mentum*, which, like a reserved farm, may be granted in feu to another vassal, and what gives rise to this idea is, that in granting the privilege of working the coal to Mr. Clerk, he has done it in the form of a disposition with a *precept of sasine*. But this seems to be a deception. A lease has often been constituted by infeftment, and yet is not a proper subject of a feudal grant. A piece of stone, or a piece of coal below the surface of the earth, is as little a proper subject of it. The petitioner, as crown vassal in the lands of Pendriech, has right to the lands *a celo ad centrum*. Mr. Simson, as subvassal, has exactly the same right *quoad* the *dominium utile*, excepting only that he has agreed to suffer the superior, and his heirs and assignees, to work out the seams of coal, and certain other minerals, if they are found within the lands. If there shall happen to be no such minerals, the whole solum of the estate *usque ad centrum*, belongs to Mr. Simson. He has right to every thing except these minerals, *e. g.*, stone, lime, sand, earth, water, &c. The wastes will also belong to him after the coal and minerals are wrought out. The subject therefore of reservation is a mere privilege of working certain mines and minerals, which does not radically affect the feudal title, but is merely a servitude or burden upon it. This the vassal must submit to, because it is a condition of his grant ; but, it is equally a condition, or inherent quality of this grant, that his surface damages shall be paid ; and this last is as much a servitude, or burden upon the *dominium directum*, as the other is a burden upon the *dominium utile*. It is admitted to be a burden upon the re-

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he reserved the coal, also bound and obliged him, and his heirs and assignees, to pay all damages to be occasioned by the working of the same. The same obligation was impos-

served right of working, *i. e.* upon the mineral which is to be wrought, but it is said to be no burden upon any of the other reserved rights, particularly the feu duty. But where is this distinction to be found in the feu contract? Every burden to which the vassal is subject is a burden upon the whole *dominium utile* given to him; and there is no reason why every burden to which the superior has subjected himself, should not be equally upon every part of the estate or interest which he has reserved.

“ It is said that he may assign, and that the word assignees in the clause of reservation, means, assignees in the coal. That he may assign, *i. e.* convey his total right, is undoubtedly true. That he may also assign it in parts, he himself remaining liable, is equally true. But the question is, Whether he can be entitled to render the condition of his vassal worse by any partial alienation? It is a possible case, that by undermining the surface, the whole of it may be rendered waste. If this shall happen, may not the vassal retain his feu duty, which was the full rent of the surface at the time? Will it be said, you shall continue to pay your feu duty to the superior, and have recourse to a personal action against the proprietor of a subject which does not exist, *viz.* the coal now wrought out?

“ It seems to be admitted, that if the coal was only let on lease, supposing for 99 years, or for 1000 years, the superior, as granter of the lease, would be liable, as well as the lessee, for the damages. But where is the difference between this and a total sale of the coal, if it be exhaustible in a much shorter period? It is easy, at this rate, to avoid the obligation, by only calculating the number of years within which the coal may be wrought out; and instead of a tack duty, and the form of a lease, taking a price or grassum payable at once, equivalent to the whole rents for so many years. In fact, the right to the coal in this case is held by Mr. Clerk as a subaltern proprietor, *under the Marquis of Lothian*, the disposition containing only a precept of *sasine de me*, so that the Marquis is his superior in that right, and ought to answer for him to Mr. Simson, the vassal in the lands, in the same way as if Clerk's right was only a lease.

“ But after all, upon reconsidering these notes, I rather incline now to think that the coal and the surface may be held as *separata tenementa* by different proprietors or vassals with different redendos; and that it may be a condition in their different rights, expressed or implied, that the superior is not to be liable for damages done by the one to the other. In the present case, there is no express stipula-

ed upon the Marquis of Lothian, by a clause in the conveyance by the heirs of Lord Ross to him, in the same words with that in the feu charter to the appellant's father. And

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tion of that kind ; but it may be understood, that when the vassal in the lands agreed to accept of his feu right, under the condition of a reserved right in the superior to dispose of the coal at pleasure, he tacitly consented to what has happened."

LORD HENDERLAND.—"As to the contract, it was doubtful, in point of law, whether a party using a reserved right was to pay damages or not. The clause here has been put in to settle that question. He binds his heirs and assignees in the right reserved. He might have sold the superiority, reserving the coal."

LORD SWINTON.—"I am for adhering to the interlocutor. A feu contract is *optima fide*. There may be no coal there, and yet much damage occasioned by searching for it. It may be sold to bankrupts (in which case he may insist for caution for the damage that may accrue from working the coal). Besides, coal is a fungible, and may be exhausted. Heirs and assignees, not only in the coal, but in the whole subject. See clause of tenendas which sets forth 'our heirs and assignees in the lands of Pendrieck,' " &c.

LORD HAILES.—"The words 'may be,' &c. must be left out."

LORD DREGHORN.—"This is a condition as well as a reservation, and appears to be made real. If sold to a bankrupt, he may stop the tacksman until damages paid, or caution found. In all cases where right is assignable, the cedent is liberated when the assignation is completed. There is a case in 1792, Trotter v. Denniston. Pitfour's opinion was that assignee in such a case was alone liable. Being a fungible, I do not consider the coal a separate property, and therefore not a proper subject of feu."

LORD ESKGROVE.—"I am against the interlocutor. The clauses referred to by Lord Swinton are applicable to the superiority alone. Suppose he had sold the superiority itself, would his heirs have continued bound?"

LORD JUSTICE CLERK.—"This question might have been settled by a few words in the contract ; the question being, What the parties meant by it? Different estates may be created in land, e.g. lands and teinds—and may hold of different superiors. Mines and minerals may also belong to different parties, because they are proper subjects of feudation, and may hold of different superiors. The statute 1592, about mines of silver, allowed to feu them to the *freeholders*, which meant *proprietors*. Coal is not a part of the *dominium directum* but a part of the *dominium utile* ; and when sold goes to the purchaser *cum suo onere*."

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the liferent right granted to the Marchioness of Lothian by the Marquis, was made subject to the same obligation to pay damages, by a similar clause in her contract of marriage. But the conveyance of the coal to Mr. Clerk did not free the Marquis or Marchioness from that obligation, because that conveyance gave to Mr. Clerk only a subordinate right, holden under the Marquis of Lothian; according to the principles of the feudal law, by which the rights to landed estates in Scotland are governed, the Marquis of Lothian is, in law, the proprietor of the coal. Besides, where a superior feus lands to a vassal, reserving the coal and other minerals, under an obligation to pay all damages to be occasioned by the working thereof, the superior cannot get quit of the obligation he has come under, and throw it exclusively on any third party to whom he may convey the right to work the coal. Until the vassal has consented to hold another bound, the superior must remain liable to the vassal.

Pleaded for the Respondent.—By the terms of the feu contract, by which the appellant acquired the *dominium utile* of the lands, Lord Ross was not barred from separating the superiority of the lands from the right of the coal. On the contrary, Lord Ross was at full liberty to give the superiority of the land to one person, and the right to the coal to another. There is no clause in the feu contract saying, that when these two estates, that is, the estate consisting of the superiority of the lands, and the estate consisting of the property of the coal, which are two estates altogether distinct, belong to different persons, the proprietor of the superiority shall be liable to the vassal for the damage done to his lands by the owner of the coal. As there is no express clause in the feu charter to this effect, so neither is there any clause, the meaning of which imports that it was the intention of parties to lay the superior under such an obligation. It is true that the feu contract, after reserving the coal, says that Lord Ross and his foresaids, that is, his heirs and assignees, shall be liable to the vassal for the damage done to his property by working the coal. But, by the fair rules of construction, no more is here meant, than that Lord Ross' assigns in the coal shall be liable for the damage which they do to the vassal in the exercise of their property. The obligation is laid upon them in the clause of reservation, and it must be understood *applicando singu-*

la singulis. It would have been a most absurd stipulation upon the part of Lord Ross, had he subjected his successors in the superiority in the damage which might be done to the vassal by his successors in the separate estate of the coal, with which his successors in the superiority were to have no connection. And nothing is more absurd and untenable in law, than to say that, independently of the absence of all express stipulation, the superior was at common law liable for the deeds of his vassal.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Sir J. Scott, J. Anstruther.*

For Respondents, *R. Dundas, W. Tait.*

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[M. 8193.]

THOMAS HOG of Newliston, Esq.,	<i>Appellant;</i>
REBECCA LASHLEY or HOG, and THOMAS	} <i>Respondents.</i>
LASHLEY, her Husband,	

House of Lords, 20th April and 7th May 1792.

LEGITIM — LEX DOMICILII — DISCHARGE OF LEGITIM — HOW IT OPERATES — HOMOLOGATION — CHILD'S SHARE OF GOODS IN COMMUNION — HERITABLE OR MOVEABLE — GOVERNMENT ANNUITIES — FRENCH FUNDS. — A Scotsman by birth left his country early in life, and settled in London, and married an English lady there. He acquired a large fortune, and purchased the estate of Newliston in Scotland, to which he sometime thereafter retired, and died there. By will the appellant was left the whole heritable and moveable estate. The eldest daughter, the respondent, was married to Dr. Lashley, and, on her marriage, it was proposed to give her £2000 as her fortune. A correspondence was entered into, by which £700 of this sum was paid them on bond, and further correspondence was entered into in regard to the balance when the father died. The younger children had all discharged their father for their shares of the legitim. But the respondent claimed her legitim, and also a share of the goods in communion, as due at her mother's death, and she raised an action against the appellant, her brother, concluding for payment. Held, 1. That she was not

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barred from homologation or acquiescence. 2. That the claim of legitim was not excluded by Mr. Hog's last settlement. 3. That as the marriage articles did not bind his fortune, so they could not preclude the mother, had she survived, from claiming her legal share. 4. That the renunciation of their shares by the younger children operated in favour of the respondent, Mrs. Lashley or Hog. 5. That the personal succession must be regulated by the *lex domicilii*, which was Scotland, and therefore included the funds both in England and elsewhere ; and that the Government annuities were moveable.

Robert Hog, afterwards of Newliston, was a native of Scotland, and left that country early in youth, and settled in London as a merchant, where he married an English lady, Miss Rachel Missing, and acquired a considerable fortune in business, besides obtaining £3000 with his wife.

On his marriage with Miss Rachel Missing, a contract of marriage was entered into, whereby the wife's portion was to be vested in lands in England, for behoof of them in life-rent and their children equally in fee. He afterwards purchased the estate of Newliston, near Edinburgh, at £18,000, to which place he soon afterwards retired. This marriage was dissolved by the death of Mrs. Hog in 1760, leaving three sons and three daughters.

Rebecca, the respondent, and eldest daughter, married Dr. Thomas Lashley, then a student of medicine at college, and a native of Barbadoes. The marriage, in consequence of having been gone into without the knowledge and consent of the father, created displeasure, and induced them to retire to Barbadoes. On this the father proposed to give his daughter £2000 of portion. They went to that island accordingly, but nothing more than £700 was paid, for which Dr. Lashley granted his bond ; and some letters passed between the parties as to the remainder of his wife's fortune, in which expressions were used on the part of the son-in-law that indicated an acknowledgment that the £2000 was to be all the fortune or claim he could expect, with the exception of one letter, which expressed larger views, and hinted at a claim of a more extensive nature. On the part of Mr. Hog, his letters in reply, gave him to understand that the £2000 was to be all, and to make his daughter equal with " my other family." These propositions came to nothing ; but, in 1771, Mr. Hog gave directions to pay Mrs. Lashley £65 per annum, being the interest of the £1300, the balance of the £2000, after deducting the £700 paid. He

afterwards executed a bond of provision for the £1300, as well as bonds of provision for each of his other daughters. He executed additional bonds of provision to all his daughters for £500 more, and was in the course of executing additional bonds for a further sum of £500 to each when he died.

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His eldest son, the appellant, was, by general settlement in his favour, left the whole heritable and moveable estate, subject to payment of his debts, and of these provisions. His personal estate was considerable, and chiefly vested in a banking concern in London, and part in English and French stock or funds, which was to go, with the landed estate in Scotland, to the appellant. All the daughters, except Mrs. Lashley, had, on their marriage, accepted their provisions, in full of all they could claim and demand, on account of their legitim, and discharged their father accordingly. So had Alexander and Rodger, the younger sons, on receiving certain sums in full; but no discharge had been granted by Mrs. Lashley or husband. After their father's death, the latter rejected the legal provisions referred to; and raised the present action, setting forth, that at her mother's death Mrs. Lashley, by the law of Scotland, was entitled to a proportion of the goods in communion, being a third, called dead's part, falling to her as one of her mother's next of kin; and that, at her father's death, she was entitled to one half of the whole personal estate of the deceased as legitim—her other brothers and sisters having accepted of the provision made by their father, and renounced and discharged their several claims of provision. Both claims she estimated at £30,000, or £15,000 each.

The defences stated were, 1. That both claims were barred by the bonds of provision granted to them, and their acceptance and homologation thereof, declared by their several letters produced in Court. 2. It was also excluded by the father's deed of settlement. 3. That the claim of legitim could not extend over the deceased's property in England and France; and, 4. That she could not avail herself of, or derive any benefit from the discharges and renunciations granted by the other younger children, so as to claim the whole legitim, but only a third thereof, there being two other younger children alive at the death of Mr. Hog, who would have received an equal share of said legitim but for their discharges and renunciation in favour of their father, granted on receiving sums in lieu thereof.

1792. By various interlocutors the Court found, 1. That the pursuer's were not barred by homologation, acquiescence, or acceptance on their part, and that the letters and correspondence adduced did not prove this. 2. That this claim of legitim was not excluded by Mr. Hog's last settlement. 3. That the marriage articles of Robert Hog with Miss Missing, as they did not bind the father's fortune, so could not preclude the mother, had she survived, from claiming her legal share. 4. "That the renunciation of their claim of legitim by the younger children operated in favour of the pursuer (Mrs. Rebecca Hog), and has the same effect as the natural death of the renouncers would have had; and as she is the only child who did not renounce, find her entitled to the whole legitim; being one half of that free personal estate belonging to her father at the time of his decease."*
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Dec. 24, 1790.
June 7, 1791.
Nov. 29, 1791.
Dec. 23, 1791.
5. "That the succession must be regulated by the *lex domicilii*;" and, consequently, that this claim of legitim extends to such personal effects in England or elsewhere, as well as in Scotland."* 6. The Court hereafter found, on further advising a reclaiming petition, "that the government annuities in England fall under the pursuer's claim of legitim," but remitted to hear further as to the government annuities in France.* 7. Also remit to hear parties further upon the pursuer's claim, in right of her mother, to a share of the goods in communion at the dissolution of the marriage.

An appeal was brought against those interlocutors as find, 1. That the letters and correspondence produced do not prove homologation and acquiescence sufficient to bar action. 2. That the respondent's claim of legitim is not excluded by the deed of settlement. 3. That the claim of legitim extends to personal estate in England or elsewhere, as well as in Scotland. 4. That the renunciation and discharge of the younger children operate in favour of the child not renouncing. 5. That the government annuities in England are moveable, and fall under the respondent's claim of legitim.

Pleaded (by MR. GRANT) for the Appellant.—This case is brought under the consideration of your Lordships, in order to settle some points of very general importance in the law of Scotland.

* *Vide* Opinions of Judges of the Court of Session at the end of the case.

By that law, a person having neither wife nor child, may dispose of his property in what manner he pleases. In marriage, if there be no special contract to exclude it, a communion of moveables takes place between husband and wife. But if a man die, leaving a wife and children, one-third part of his personal property goes to his wife, which is called the *jus relictæ*; one-third part to the children, which is styled the legitim; and the remainder, called the *dead's part*, the owner may dispose of to whom he pleases. This right of legitim may be renounced, with or without a consideration; and upon such renunciation, the general doctrine seems to be, that the share of the child renouncing accrues to the other children, unless a contrary intention of the father has been manifested. From what has been said, it appears that the right of legitim goes to one half of whatever personal property the father dies possessed of, that is, not affected by the *jus relictæ*.

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In this case, five points will arise.

1. What will be the effect of an implied renunciation, supposing it to exist in fact in this case? 2. Whether the right of the children to legitim may not be barred by a deed *inter vivos*, executed by the father in his lifetime. 3. Whether the share of a child renouncing does not accrue to the father, so as to enable him to dispose of it by will? 4. Whether, though the deed executed by Mr. Hog be ineffectual in Scotland, it will not operate as a will in England, so as to convey the personal property in that country, according to the deceased's intention? 5. If not on the ground that the *lex domicilii* is to prevail, then, whether the property in the English funds is not to be considered as immoveable property, and descendible to the heir, which would be the case of any fund in Scotland having a *tractus futuri temporis*?

If either of the two first points be decided for the appellant, it will render the consideration of all the latter ones unnecessary, as they both go to the whole question; but the latter questions only go to the quantum of the sum to which Mrs. Lashley will be entitled. Such are the questions arising out of the facts I am going to state to the House, (here Mr. Grant stated the facts.) The marriage of the late Mr. Hog was contracted in England, by parties resident in England and domiciled there; therefore there was no communion of goods between Mr. Hog and his wife;

1792. because a settlement was executed upon the marriage, having a respect to English property, and to a marriage in England. It further appears, that all the children were
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At one period, since her marriage, it is clear that Mrs. Lashley had no idea of a right to legitim, for in her letter of 27th February 1771, she speaks of £65 being the interest at 5 per cent *for the remaining* £1300 of *my fortune*, which words certainly imply “all that she ever expected” to receive from her father, or thought she had any right “to;” and by such expressions, every idea of a mere temporary allowance to a child is removed. Mr. Hog himself certainly entertained the same idea, for, in 1775, he executed formal bonds of provision in favour of Mrs. Lashley and his other daughters, in which he mentions £2000 to be in full satisfaction of the legitim.

It must be admitted, that if this were entirely the case of a Scotch succession, and no will, there would have been a division amongst the younger children unless they had renounced. But in this case, the appellant, Mr. Hog proved the deed which was executed in his favour by his father in 1787 as a will of personal property in England. Soon after the death of her father, Mrs. Lashley brought this action. In the Court below, several defences were set up by Mr. Hog, the appellant.

First, it was contended that Mrs. Lashley’s claim to the legitim was wholly excluded by her acceptance of the provision made by her father; and that the facts and circumstances in this case amounted to a renunciation.

The second answer made to her demand was, that Mr. Hog the father, had not left his property to be disposed of by the law, but that he had disposed of it by a rational deed *inter vivos*, which it was competent for him to do. These two defences, if either of them had prevailed, would have been an answer to the whole of Mrs. Lashley’s demand.

But it was further contended below, by way of partial defence, that as there was property in England, upon which the deed executed by Mr. Hog could operate as a will, that property must be excluded from the claim of legitim.

It was further insisted, that a renunciation by the other

children had no effect to increase Mrs. Lashley's share of legitim, but only gave Mr. Hog the father, a power to dispose of it.

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Lastly, It was contended, that the property in the English funds would go to the heir, and not to the executor; for it was either affected by the will, which gave it to Mr. Hog, the appellant; or if the law of the domicile prevented the will from having its due operation, the same law must be resorted to, to show how it must descend; and that law in this case would carry it to the heir.

These were the points rested upon below; but I must admit they were all decided against us, and I am now to trouble your Lordships with arguments in support of them.

The first point is, as to the effect of Mrs. Lashley's acceptance. The correspondence contained in the second and third pages of the appellant's printed case, proves, by the uniform expressions, Mr. Hog's intention to give Mrs. Lashley the same, and no larger fortune, than he bestowed upon his other daughters; and also Mrs. Lashley's intention to accept it as her *fortune*. Fortune is a word of particular import, and is always used to signify the whole sum that a parent means to bestow upon a child.

The renunciation of various rights may be collected from facts and circumstances as well as by deed, unless there be some express law to the contrary; which is not pretended to exist in this case. The other children of Mr. Hog's were executing formal deeds of provision, and in them, a clause of renunciation was inserted. She not being with her father, did not execute an instrument, and therefore, there is no formal renunciation; but words are frequently used by Mrs. Lashley and her husband tantamount to it. In her bills drawn for £65 per annum; she mentions it *as interest due to her*, which proves she could not be speaking of a bounty or temporary provision. Mr. Hog having acquiesced in the statement of £2000 as her fortune, if an action had been brought against him or his executors for that sum, they could not have defended themselves against such a demand. If so, the obligation must be mutual, and I contend, that Mrs. Lashley is debarred from her legitim, because she consents to accept of £2000 as her fortune. But, supposing your Lordships to hold that there must be an express renunciation, then I contend;

Secondly, that by a rational deed executed *inter vivos in*

1792. *liege poustie*, not upon death-bed, the father may exclude the legitim. Mr. Erskine (Book III. tit. 9, § 16), says "That rational deeds granted by the father in relation to his moveable estate, if they be executed in the form of a disposition *inter vivos*, are sustained, though their effect should be suspended till his death." Is there any thing irrational in all Hog's settlement?

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Erskine's position is supported by adjudged cases; The case of *Johnston v. Johnston* from Fountainhall, mentioned in Kaimes' Dict. of Dec. vol. 1, tit. Legitim, p. 545.

To the same point is the case of Lady Balmain, in the same page, which was to this effect: A disposition by a husband to his wife of the stocking that should be upon his mains at the time of his decease, being objected to by his children, as in prejudice of their legitim, being of a testamentary nature revocable, as not having been a delivered evident; it was answered, that the form of the deed, is *per modum actus inter vivos*, whereby a present right is conveyed, though suspended till the grantor's death, and being done in *liege poustie*, it cannot be reached by the law of death-bed, and there lies no other bar to the father's power of alienation.

These cases are in point, and no contrary determination has been stated, where the claim of the children has prevailed against a rational disposition of the father. Formerly, a man could not disappoint the heir as to the descent of real estate, but the power of disposal as to such property has increased, by merely using words of disposition instead of words of devising. If the shackles are thus taken off as to real estate, it is strange that they should still be continued upon personal property. To establish so absurd a principle, your Lordships will think it necessary to be furnished with a long chain of concurrent authorities, and even that will hardly be sufficient, in a matter so contrary to reason. In the law of Scotland, till lately, the *lex loci rei sitæ* was supposed to be the law that was to govern, and all the decisions are uniformly that way; but now, by a decision of your Lordships in *Bruce v. Bruce*, the rule of the *lex domicilii* has been established. Therefore, even if the decisions were against me, which I have shown they are not, your Lordships ought to decide for the appellant, upon the principle of removing, as much as possible, all restraints upon property, and the disposition of it.

Vide ante.

Thirdly, As to the effect of the renunciation of the other

children. When a father advances a fortune to one child, that child and the father are the parties to the contract, and the other children have no right to interfere. If any advantage results from that agreement, the father ought to have the benefit of it, and he ought also to have the power of disposing. I admit it is laid down in general, that the share renounced goes to the other children wholly, and not to the heir; but all the cases decided on that point are where the father dies intestate, and where that is the case, he is presumed not to have chosen to exercise the right he acquired. From making no disposition, it is evident he meant to benefit the other younger children; and whether a child shall or shall not be barred of legitim, is entirely a question of intention; for even where a father makes a provision for a child, he may exempt such child from the necessity of collating such provision. The only case material upon the subject is that of *Henderson v. Henderson* (Dict. of Dec. vol. I. p. 545), and that is apparently against me. But, in that case, there was no renunciation, and therefore I contend that there is no case in which a child has renounced, and the father has made a will acting upon that renounced share, to be found against me.

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The fourth question is, how far the deed executed in Scotland by Mr. Hog will be effectual in England as a will, so as to bind the property in England? I am bound to admit, after the decision of the House in *Bruce v. Bruce*, that the *lex domicilii* is the rule of decision that must prevail, as to the disposition of property, where the party dies intestate. For it certainly would be extremely inconvenient that many different rules should prevail in the disposition of property belonging to the same individual. It would also be probably inconsistent with the intention of the proprietor, for where he dies intestate, it may be presumed that he approved of the law of domicil. But how is this rule to be preserved, where the property is in another country, and the law of the domicil can only extend to its own territories, so as not to be able to compel the foreign state, where the property actually lies, to enforce it? It is done in this way: the foreign state adopts the law of domicil, not as a rule binding upon them, but as the presumed will of the deceased; or they resort to a fiction, by saying that moveables have no *situs*, but are attached to the person of the owner. It is necessity only that obliges a court of justice to resort to either the

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one or the other of these means. But the case is very different where a disposition is made, which would be effectual to transfer property in England, if the property be exactly there. For, supposing a man has made a disposition, effectual by the law of the country where the property happens to be, what reason or necessity is there to resort either to the presumption of implied will, or to the fiction? The law of Scotland does not deny to the owner the power of disposition, but only the form in which it is conceived: now, that is a mere local regulation, and ought not to bind the courts of any other country.

I agree with the argument, that it would be impolitic in the commercial world that the *lex loci* should govern the disposition of property accidentally there, in a course of commerce. The opinion of Lord Hardwicke in *Thorne v. Watkins*, 2 Ves. 35, turns entirely upon the policy in a case of intestacy. But where a man makes a will, the question of policy does not arise.

Fifthly, As to the property in the English funds. It is a clear principle of the law of Scotland, that annuities are considered as heritable, and descend to the heir; and therefore if the *lex domicilii* is to prevail, you must apply it to the whole of the property, which will exclude Mrs. Lashley from any share of that property which is in the English funds. It is true, that by the law of England, such property is considered as personal, but then that must be with reference to cases in England, the parties being English, and domiciled there. It does not seem to have been a question much agitated by writers on general law, what rule is in general to prevail, Whether the *lex domicilii* or *lex loci*, as to the point whether the property is to be considered moveable or immoveable. Pothier (vol. III. p. 528, § 85), in treating of the communion of goods between married persons, clearly states the point, and declares it to be settled that the law of domicil where the creditor resides, is the rule that is to prevail; and that decision seems to be agreeable to reason. If that rule prevails, then Mrs. Lashley cannot claim legitim in the English funds, because they were not the subject of legitim, but descend to the heir.

These are all the grounds of defence upon which a partial or total reversal of the judgment is prayed.

April 30, 1792.

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Mr. ANSTRUTHER spoke on same side.

Pleaded by the Lord Advocate (DUNDAS) for the Respondents.—I am to trouble the House in support of a judgment which, except upon one point of testate or intestate succession, was an unanimous one in the Court below. The points are five :

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1. Homologation, by the law of Scotland, is, where a party by actual or presumed acceptance, releases or confirms a contract. But, in order to make such an act binding, it must appear that the party releasing or confirming, did so with full knowledge of what he was doing. Now, in this case, the letters that have been produced do not even state that the legitim was at all even a subject of consideration. The sum of £2000, so much spoken of, was merely a matter of bounty from the late Mr. Hog. The case did not admit of homologation, for Mrs. Lashley's legal claims were never even stated or taken notice of in the whole correspondence. The sum of £700 was so far from being in part satisfaction of the legitim, that it was money lent, for which Mr. Hog took a bond, that he might at any time, even to the time of his death, have put in suit and enforced. If the £65 was meant as the annual interest of Mrs. Lashley's fortune, it is strange that Mr. Hog should still talk of the £700 as a debt, which he does in all his letters. As late as the year 1772 he speaks of the £65 per annum as an annuity and bounty during pleasure. Erskine (Book III. tit. 9, § 23.) expressly declares, that a virtual renunciation of the legitim will not do, in the following terms, after stating that it may be renounced by a child, even without satisfaction : " As this right of legitim is strongly founded in nature, the renunciation of it is not to be inferred by implication. It is not to be presumed, either from the child's marriage, or his carrying on a trade by himself, or even his acceptance of a special provision from the father at his marriage, if he have not expressly accepted of the provision in full satisfaction of the legitim." This right, though it be not necessary, in order to decide the case, to discuss the nature of it, seems to me to partake more of the *jus crediti* than a right of succession ; although that *jus crediti* may certainly be defeated in the lifetime of the father. This brings me to the second point ; namely, Whether Mrs. Lashley's claim to the legitim is

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barred by an act of her father, Mr. Hog? I contend that the instrument produced, so far as the moveable property is concerned, is really a testament and not a deed *inter vivos*. Now, it is clear from the authority of Mr. Erskine (Book iii. tit. 9, § 16), that a husband, though he should be in *liege poustie*, cannot dispose of his moveables to the prejudice of the *jus relictæ*, or right of legitim, by way of testament, or, indeed, by any revocable deed. The question then is, whether the deed in question falls under the description of a deed *inter vivos*? It is certainly good as to heritable estate; but, when he comes to dispose of this personalty, it is a mere testament, for he appoints executors, &c. The cases quoted do not affect my argument; for these were cases of rational deeds *inter vivos*; but I insist upon this as being a new testament of personal property.

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The third point is, as to the effect of the renunciation by the other children of Mr. Hog; and I contend that the benefit of that renunciation does not tend to the profit either of the father or of the heir, but tends to increase the legitim. It has been much argued here and below, upon the policy and expediency of the measure. But after authorities so numerous, and of so much weight, and the variety of decisions in support of those authorities, it is impossible to recur to arguments of general policy. The renunciation of the legitim is not understood as a bargain between the father and the child renouncing; but the child, by anticipation, receives his legitim, and therefore, it is but justice that those who remain should have their share. The authorities quoted in the case of the respondent, p. 10, are all unanimous.

The first is the instructions given for the guidance of the Commissaries as to the confirmation of testament in 1606, Lord Stair, Book iii. tit. 8, § 46. Lord Bankton, Book iii. tit. 8, § 15. Erskine, Book iii. tit. 9, § 23.

These authorities all concur in establishing the rule, that a child's renunciation of the legitim has the same effect in regard to the younger children, as the death of the renouncer, so that his share divides equally among the rest. This doctrine was admitted in its full extent by all the judges in Scotland in this case, except one (Lord Dreghorn), who has argued on the contrary side, upon principles of policy and

upon grounds of expediency, which are wholly inadmissible in this case.

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The fourth point is, whether or not the will of Mr. Hog is to have an operation upon the property in England, notwithstanding the law of the domicile. In the case of *Bruce v. Bruce*, (*Vide ante* p. 163,) the House of Lords certainly did state an opinion upon the general point of the law of domicile, in a case of intestate succession; but the same rule must apply to a case of testate succession. If it be admitted that moveables are supposed to be where the owner is domiciled, then the case is clearly with my client, because then the will can have no effect; for if this will were produced in Scotland, it could not defeat the legitim. Can a court of law, by a mere transmission into another country, give validity to an instrument which it could not have in the country where the party executing it resided?

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In the case of *Kilpatrick*, before Lord Kenyon, then Master of the Rolls, (Respondent's case, p. 7), the matter was viewed in this very light; and the only question was, whether the will was good by the law of Scotland? Whenever that point was ascertained, the decree proceeded according to that law.

In *Dirleton's Doubts* (Respondent's case, p. 8), it is said that "*testamenti factis* ought, in all reason, to follow the "person."

Lord Kames (same page) puts a case as to the *jus relictæ*, and concludes with an observation equally applicable to this point. "At any rate, the *jus relictæ* must have its effect as to his moveables in Scotland; and it would be a little strange to say, that his transient effects should be withdrawn for no better reason than that they happen accidentally to be in a foreign country, where the *jus relictæ* does not obtain." Nor does this doctrine at all militate against the truth of the position, that when a person follows property into a foreign country in any process, he must conform to the modes pointed out in that country where the debtor resides.

Fifthly, as to the question, whether the money lodged in the 5 per cent. annuities is to be considered as moveable or immoveable? It is said, that if the law of domicile is to be resorted to on one point, namely, as to the testate or intestate succession, so it must on every other; and then it is insisted, that by the law of the domicile, this particular species of property would be considered as heritable, and conse-

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 LASHLEY, &c. frequently must descend to the heir. But we contend that if these funds had been locally situated in Scotland, they would still have been deemed moveable. There are, by the law of Scotland, certain particular rights having a *tractus futuri temporis*, and carrying a yearly profit to the creditor, without relation to any capital sum or stock that are heritable. But the funds in question have not a *tractus futuri temporis* within the meaning of this law; for, in order to make such a subject heritable, it must be a substantive right, without relation to any *capital sum or stock*.

This question occurred in the beginning of this century and again in 1735; and it was then solemnly decided, that the shares of the Bank of Scotland are not heritable; but simply moveable. The five per cent. annuities fall precisely within Mr. Erskine's description of that species of property which is not to be considered as having a *tractus futuri temporis*. See the whole passage from Book ii. tit. 2, § 6, quoted in Respondent's case, p. 8.

Besides, if there were any doubt upon the law of Scotland, this is a British debt, and the act 25 Geo. III. c. 32, § 7, declares it to be personal estate.

Mr. SOLICITOR GENERAL (afterwards Lord Eldon) on same side.

The clause of legitim, by the law of Scotland, is exactly similar to the orphan's share in the custom of London; and it is singular that there is hardly any question which has been agitated as the right of legitim, that has not also arisen with respect to that custom; and every decision upon it has been conformable to the decisions in Scotland.

The first point is, whether my clients, the respondents, are barred by any homologation or acceptance?

The legitim cannot be barred by an implied assent; and upon this point, without entering into a discussion of the law, I rely upon the fact. In the whole of the correspondence relied upon for the appellant, no contract appears for any precise sum to be given for the legitim; and even if a sum were mentioned, no terms are imposed, nor even hinted at, that have the smallest connection with legitim. The bond referred to by Mr. Hog, in his letter of September 1768, was reserved by him in his repositories to his last moments, and might have been put in suit at any time. When, in another place, he proposes the sum of £2000 as an equal share with his other daughters, he does not even state their renunciation of their claim of legitim, or his expectation

that Mrs. Lashley would do the same. In another letter Mr. Hog speaks of his bounty to Mrs. Lashley : and so late as 1772, he says he *will continue his bounty* so long as her behaviour merits it. In one of the deeds of provision also he recites that £700 was due by Mr. Lashley upon bond ; so that he himself never considered it as an advance in satisfaction of the legitim. Indeed the idea of giving up the legitim never was the subject of consideration of these parties.

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LORD CHANCELLOR (THURLOW) asked whether it was admitted that the husband, after marriage, might renounce the wife's share of legitim.

MR. SOLICITOR GENERAL.—I do not admit it ; for if a husband renounced his wife's share under the custom of London, and she survived her husband, I doubt very much whether she would be barred by that renunciation.

The second point is, whether Mrs. Lashley is barred by any act of her father, Mr. Hog. A great many acts might be done by a freeman of London, to defeat the custom ; but if he did any act, which turned out to be a will, it was held to be a fraud upon the custom, and therefore void. So held in the case of *Tomkyns v. Ladbroke*, 2 Vezoy, 561, where Lord Hardwicke said, that a freeman may, by act in his life, and even *in extremis*, give away any part of his personal estate, provided he divests himself of all property in it ; though if he reserve to himself a power over it, that is considered as void. The act of the father was of a testamentary nature, and therefore must be judged to be an act in fraud of the custom ; so in this case the deed executed by Mr. Hog was in fraud of the legitim, and therefore void. I cannot forbear to mention in this place, some other peculiarities in the custom of London, which apply to other parts of the cause. It appears that the custom attached upon property not locally situated within the city, so that the will of a freeman would no more operate upon it than if within the walls. 4 Burn, Eccles : Law, tit. Wills, p. 378.

In the year 1734 it became a question whether a composition with the wife for her customary part would accrue to the benefit of the father or the child ? It was held that, in such case, it should be taken as if the wife were dead, so that the father would have one moiety and the children the other. 1 P. Wms. 644. In 2 Vez. 592, Lord Hardwicke enters into the history of the cases, and holds it to be settled that a composition with the wife, has the same effect as

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if she were dead. If then, the father takes no particular or exclusive benefit by a composition with the wife, it should seem strange if a contrary rule prevailed on a composition

In this case, it is argued, that as the father might easily have defeated the right of legitim, the mode he has adopted will do as well as any other, although the law of the country has said directly to the contrary. The question is, Has he done that act, which the law has required him to do, in order to defeat this right? Will this deed, coupled with the bond of provision, exclude the right of legitim? The bond alone will not do, because it remained in his bureau till the moment of his death; and as to the deed, no single judge in the court below had a doubt upon it. The deed, as to the personal estate, is merely in the form of a Scotch testament. A deed, with a power of revocation, vests a present interest, subject, however, to be defeated by the act of the donor; but a deed, to have no effect till the death of the donor, is very different. The cases quoted on this subject are not analogous to it. Johnstone's case, if it were analogous, is of doubtful authority. Lady Balmain's case is not applicable; and the last case upon the subject, of Henderson v. Henderson, is decisive against both the former.

The third question goes as to the extent of the legitim; and it seems that, in a case of intestate succession, Mrs. Lashley would be clearly entitled to legitim, both as to the English and Scotch effects. Taking it for granted that the case of Bruce v. Bruce in the House of Lords, has decided the point, that the law of domicile must be resorted to as the rule in a case of intestate succession, it seems to me to apply much stronger in a case of testate succession. If the *lex loci* is to govern in a case of the latter sort, is it to be the *lex loci rei sitae* at the time when the will is made, or at the time when the owner dies? If the law of the domicile is not to prevail, how many different laws are? For if it be not, the disposition of property must depend, not upon the will of the owner, but on the situation of the various persons in whose hands his effects may happen to be placed; nay, it may depend even upon their caprice or will, rather than upon that of the owner; for a creditor will have nothing to do, but to change his place of abode, and the will of the owner is again defeated.

But I contend that this cannot be the rule; for if a man makes a will, though he uses words which, in the country

where the personal property happens to be, would convey every thing, yet it will be restrained in its operation by the law of the domicile. In other terms, if a man in Scotland devises *all* his personal estate, and the law of the country only permits him to devise the half, neither would it convey more in England. The law of Scotland upon this point is clear and decisive; the passages have been read to you by the Lord Advocate, and they are all stated in the respondent's case, p. 8. The law of England is no less plain upon this point, and is fully stated by Lord Hardwicke in *Thorne v. Watkins*, 2 Vez. 35. And in that case Lord Hardwicke evidently meant to allude either to a case of testate or intestate succession; for he speaks of probate or administration.

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The case of Kilpatrick at the Rolls, must carry great weight, for although the case was not argued at the bar with much pertinacity, yet Lord Kenyon considered the subject, and founded his decree upon the report of what the rule of the Scotch law was, and that was the case of a will.

In the case of the *jus relictæ*, as well as of the *legitim*, there is good reason for declaring that the law of the domicile shall prevail; for parties contracting matrimony may be reasonably supposed to have a view to these advantages and benefits which the laws of their country, by virtue of that relation, entitle them to expect. There ought, then, to be the highest authority to say, that a man who is, and continues to be domiciled in Scotland, shall not be enabled, by placing his property in the English funds, to disappoint the reasonable expectations of his wife, who by the law of his and her domicile, is entitled to one half of his personal estate where there is no children: or, if there be any, to defeat both her and them of their legal claims.

The fourth point is, as to the effect which the renunciation by the other children shall have. I contend that it is in the nature of a bargain made by the father with the child renouncing, for the benefit of the other children. It is a contract that the child renouncing shall not claim any part of the father's fortune; but it is not a contract that the father shall claim the renounced share, instead of the renouncer. It is unnecessary to argue this point as an abstract proposition, because it has been decided over and over again; and therefore it is too late to argue upon the reason of the thing, or upon the policy or expediency of such a rule having been adopted.

1792. Fifthly, As to the question, whether the property of the late Mr. Hog in the English funds is to be considered as moveable or immoveable property? it has been assumed, in argument, that if these funds were in Scotland, they would be deemed heritable property; but that is a position which I absolutely deny. Rights of this nature, which are deemed to be heritable by the law of Scotland, are such as carry a yearly profit, without relation to any capital sum or stock. But your Lordships know that the five per cent. annuities depend upon the capital stock; for it is in respect of his capital stock, that the holder of it is entitled to an annuity. If he propose to transfer it, he does not transfer an annuity, but the *stock*. The legislature has expressly declared that his fund shall be considered as personal, and shall go to the executor. Shall a different rule prevail in Scotland, from what the wisdom of parliament has pointed out? Shall they go to the Scotch executor, as trustee for the heir at law, and to the English executor, for the benefit of the next of kin, under the statute of distributions? Upon this point the authority of Mr. Erskine (Book ii. tit. 2, § 8,) is express, where he says, that “the shares of the proprietors in any public company or corporation constituted either by statute or patent are considered as moveable.”*

7th May 1792.

Mr. GRANT heard in reply.

The LORD CHANCELLOR (THURLOW) moved to affirm the judgment of the Court below.

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *T. Erskine, W. Grant, J. Anstruther.*

For Respondents, *Sir J. Scott, Lord Advocate Dundas, Alex. Wight, Wm. Adam, John Clerk.*

* Opinions of Judges of Court of Session.—*Vide* p. 250.

LORD PRESIDENT CAMPBELL.—“This is a claim of legitim out of English effects. Questions which concern the laws of different countries, and where, in case of variance, a general rule must be laid down, are always of importance, and often of nice discussion.

“Many points have been settled concerning the constitution of obligations in foreign countries, prescription of rights, limitation of actions, foreign decrees, the operation of foreign statutes, &c. though

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ERROR in the COURT of EXCHEQUER in Scotland.

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DAVID PATRICK, . . . *Plaintiff in Error;*
HIS MAJESTY'S ADVOCATE, . . . *Defendant in Error.*

House of Lords, 23d April 1792.

CONSTRUCTION OF STATUTES—DUTIES ON MALT LIQUORS—EXEMPTION CLAUSE.—Where the exempting clauses in the previous statutes were omitted in a new act, remodelling the duties on the sale of malt liquors : Held that, in order to continue such exemptions, it was not necessary that these should be expressly repeated in the new act.

An information was filed against the appellant, in the Court of Exchequer, to recover a penalty of £50, for having

as to this last, there is still some confusion as to the effect of the English bankrupt statutes here.

“ The general question about intestate succession seems likewise to be now understood and at rest. The determinations of Lord Hardwicke are founded upon principles of law, upon expediency, and upon the authority of writers in general law ; and the English courts having adopted his rule of *lex domicilii*, which was agreeable to our practice 40 years ago, and to the authorities of some of our best writers. Though departed from in some recent cases, we ought now, without hesitation, to return to the decision in the case of Brown of Braid, and to hold that rule as established in time coming.

“ In the cases of Elsherson *v.* Davidson, and M'Lean *v.* Henderson, the Court was misled, by supposing that the determinations in England stood in favour of the *res sitae*. This was owing to some mistaken idea about Lord Banff's succession, where a short and hasty opinion had been given by Sir Dudley Ryder, pointing at the *res sitae* as the rule, but the truth is, that Lord Banff, who was a seaman, had no fixed domicile, and died in Lisbon, leaving a furnished house in London, and his money in the funds, so that although he was a Scots peer, and had some real estate in Scotland, yet there was more ground for considering England than Scotland as his *locus domicilii*. See Session Papers, vol. 59. No. 68.

“ The circumstances of Lord Dacre's case are not known. See Voet. lib. tit. 4, part 2, § 8 and 11. Lib. i. tit. 8, § 30. Lib. v. tit. 2, § 47. Lib. xxviii. tit. 1, § 44.—Vinnius, Select Quest. lib. ii. tit. 19. Christeneus, p. 812.—Vattel, lib. ii. c. 8, § iii. Rodenburg,

1792. retailed certain spirituous liquors and strong waters, without first taking out a license. Trial was led, and a special verdict settled, stating that the defendant did, within the period mentioned in the information, retail spirits made and

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de Jure Conjugum, p. 20. See also case of Mrs. Morris against Wright, Session Papers, vol. 51, No. 124. It was by that time discovered that the decisions of the English Courts were not, as supposed in the case of Elsherson, vol. 34, No. 81, (Session Pap.); but the Court thought they could not well retract. The case, however, of Morris was appealed, and afterwards settled between the parties.

“ In the present case, the difficulty arises from this, that there was a will, and if the case of intestate succession turns upon presumed will, it may be thought that *express will* should prevail, especially as moveable effects have in certain respects a local situation, though in others they are said to follow the person, and it may be thought somewhat strong to deny effect to a will formally executed, upon account of a municipal rule in another country, where the testor lived, but not in the country where the effects are, and where execution upon the will is desired, upon which last principle the Court of Session seems to have gone in case of a bastard, and in the case of a nuncupative will, Dict. vol. i. p. 320.

“ But, notwithstanding these observations, it would rather seem, that questions concerning succession in general, in the case of moveable or personal effects, should rather depend upon the *lex domicilii* than that of *rei sitae*. Moveable goods may be transiently in another place than that of the donor's residence; but it cannot be his meaning that they should remain fixed there any longer than till he has an opportunity of bringing them home, so that whether he dies testate or intestate as to such effects, he cannot be supposed to regulate himself by any other law than that of his own country, in the transmission of them to his successors after death.

“ The case is still clearer as to *nomina debitorum*, which are *jura incorporalia* attached to his person, and in their nature scarcely admitting of a fixed situation.

“ Every right and interest of the creditor ought to be regulated by his own law. The *jus exigendi* is in him, and that right he is entitled to convey by the forms of his own law, and likewise to transmit to his successors *a testato vel ab intestato* in the manner which his law directs, though with respect to the debtor, when either the creditor, or his heirs or assigns, have occasion to take measures for recovering their money, they must go to the forum to which he belongs, and of course must be subject to the forms and solemnities of that law.

“ The present question is, to whom the effects belong, not in what manner they are to be recovered; and it may even be doubted whe-

distilled from malt, in Scotland commonly called and known by the name of Aqua Vitæ or Whisky, but not other spirituous liquors. Against this special verdict the defence stated was, that in regard to such spirits made from malt, there was an exemption under the acts of parliament.

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ther the late Mr. Hog made any will in prejudice of the claim. He made a settlement, conveying to his eldest son all and sundry debts and sums of money, &c. belonging to him at his death, which should not be otherwise disposed of. This is a sweeping clause, carrying every residue, but not interfering with special rights. It is similar to the case of Sir L. Dundas' general settlement, which was not found to reach an estate formerly settled by him.

" Mr. Hog's children had, by the law of this country, a certain right in his personal effects, which became completely vested immediately upon his death, without any other form or title. This right he could not take from them by any testamentary provision, and although there can be little doubt that he meant to deprive his daughter, Mrs. Lashley, of her legitim if he could, yet the mere residuary conveyance to his eldest son is not even a proof of his intention, and, at any rate, if not within his power, must be set aside. The right to legitim attaches upon all the personal effects wherever situated, the law making no distinction. The will, at the same time, has its effect, with that exception, and therefore it may be proved in Doctor's Commons, but the executor under the will is nevertheless liable to account to those having interest according to their legal rights, and if it should become necessary to apply to a judge in England to enforce that obligation, the judge ought to inquire what rights his family, and others concerned, have, according to the law of Mr. Hog's country. He will sustain the deed, if formal according to the law of Scotland, though not precisely according to the law of England ; but he must take the whole of Scotland together, and not divide it into parts.

" Sometimes it may be difficult to discover where a person's residence is, as in the case of Lord Banff. But this being discovered, the other consequences follow.

" The most difficult case is that of a testament in Scotland, bequeathing heirship moveables, or bonds secluding executors in England, or mortgage there. As to the two first, there seems to be little doubt that the heir would take them, as entitled to do so by the law of Scotland. As to the third, the doubt is, whether it is real or personal ? It is real with us, and personal in England."

LORD ESKGROVE.—" Right of legitim is a legal and effectual right *in suo genere*. It may indeed be defeated in different ways. The father, no doubt may dispoise his estate, or lay it out in a different

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By the act 9 Geo. II. c. 23, licenses were required to be taken out by all retailers of spirituous liquors, with two exceptions in favour of, 1st Physicians, apothecaries, surgeons, or chymists, as to any spirituous liquors they may use in

manner. But *quoad* the legitim every man dies intestate, and he cannot hurt that claim."

LORD HENDERLAND.—"The question is, whether you will extend a municipal usage in Scotland to effects in England, in opposition to the will of the defunct. To say that the testament has no effect in England, is a begging of the question. Lord Hardwicke's decision founded on expediency."

LORD ROCKVILLE.—"I think the law of the domicile must be the rule. It may be said that the law of deathbed may be got the better of by not leaving matters to the operation of it."

LORD DREGHORN.—"I have long been satisfied that the *lex domicilii* was the rule, and that, where there were different domiciles, the law of the nativity is to be preferred. It would be inextricable if one's succession were to go as the effects happen to be scattered over different countries. As to the case where there is a will, I think it makes no difference. No good reason for distinction. As to effects in England.—Statutes have effect, and do go beyond the territory, unless there be something *contra bonos mores*, or repugnant to the principles of morality or religion, as in case of Negro. Suppose the crown was demanding the moveables in England, in opposition to the brother uterine, the judge in England may hesitate to do so, because it is against the rule of natural justice."

LORD SWINTON.—"I am clear that the *lex domicilii* is the rule."

LORD DUNSINNAN.—"When he placed his money in the funds he did not mean to withdraw it from the law of his own country, or to alter his right."

LORD ANKERVILLE.—"The legal provisions introduced to supply want of special ones. But if the effects are disposed of by a regular deed, this ought to prevail."

LORD HAILES.—"Our own judgments not yet altered by the House of Lords."

LORD JUSTICE CLERK.—"Upon reconsidering the case of intestate succession, am now of opinion that the *lex domicilii* is the rule. This founded on reason. Fiction of all the effects being here, is founded upon his presumed will, and *a fortiori* ought to give effect to his declared will. Doubt therefore as to testate succession where will regulates. It is in the power of father to disappoint legitim."

Judgment.—"Find that the claim of legitim reaches to the English effects as well as the Scotch, notwithstanding the will."

making up medicine; and, 2d “ That nothing in this act
 “ contained shall extend to charge with any of the duties
 “ directed to be paid or levied as aforesaid, any spirits made
 “ or distilled from malt, and retailed and consumed in

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Interlocutor 29th November 1791.

LORD PRESIDENT CAMPBELL.—“ First point. The question is properly stated in Ans. p. 11, &c. Parties do not differ upon the point, what is the municipal law of succession in England, and what it is in Scotland; but singly upon this, whether the law of the one country or that of the other should be the rule, where the domicile is in the one country and the effects in the other?

“ Neither is there now any difference, at least there ought to be none, in the case of intestate succession; for it is now fixed as a rule of general law with regard to personal estate, that the *lex domicilii* must prevail. It only remains, therefore, to be fixed whether the general rule takes place in opposition to a will, when the law of the domicile either denies or abridges the power of testing, and when the law is otherwise in *loco rei sitae*, or *vice versa*, where the power of testing is affected by the law of the *loci rei sitae*, but not by that of the domicile.

“ In the last case, it seems to be admitted that the restraints imposed by the law of the *res sitae* cannot operate. Thus, if an Englishman happens to have effects in Scotland at his death, his own residence being in England, the restraints in Scotland arising from legitim, &c. will produce no effect to the prejudice of his right of testing in his own country, even with respect to his effects in Scotland.

“ This reduces the question to a narrow compass, for it seems to lay out of the question the *lex rei sitae* as having any effect in questions of succession, whether *a testato vel ab intestato*; and the petitioner, aware of his difficulty, endeavours also to lay out of the question the *lex domicilii*, and to set up the power of a will as supereminent against both.

“ What then if the law of both countries agreed in imposing the restraint? Some of the effects in this case are said to have been in the French funds at Mr. Hog's death; and it is believed the law of France is the same with the law of Scotland as to the legitim. The petitioner's (Mr. Hog) argument goes to this, that the will in his favour is to carry these French effects, and the legitim is to be defeated, though it be the law both of Scotland and France. The absurdity of this is obvious, and there is no way of getting out of the dilemma except by making choice of one or other of the two laws, where they are different, or by following them both, where they are at one in determining whether the will is to be controlled or not, and to what extent, or, in other words, to establish some general

1792. "Scotland, commonly called or known by the name of
 "aqua vitæ." By a subsequent act the above act was re-
 pealed, and a new license duty of 20s. imposed instead of
 £50. This act contained express exemptions in favour of
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 16 Geo. II.

rule of the law of nations, to decide *for* the will or *against* it, according to circumstances; for it would be strange to maintain that no law shall control a will, whether it be of the one country or the other, or of both, where the domicilium and the *res sitæ* happen to be different.

"All the foreign authorities, including the English, are at one upon the subject. Those of Scotland have wandered, but as it is a question of general law, opposed to municipal law, it is impossible we can have a rule in Scotland different from that which obtains in other countries.

"Neither did our ancestors make any distinction between moveable effects situated within Scotland, and elsewhere. The *communio bonorum* between husband and wife operates as a general copartnery without limitation of place, and the interest which arises in the children upon the father's death, which they cannot be deprived of by any testamentary deed, is equally without limitation. It is an universitas. The question is, to whom the effects belong? and this being found out, the rights of parties must be regulated accordingly. The testament being null as to the legitim, it no longer stands in the way.

"Second point. The argument upon this head in the answers, p. 92, &c., and likewise in the memorial drawn by Mr. Blair, is unanswerable, (namely, that the renunciation of their claims by the other younger children of the deceased Mr. Hog operates in favour of Mrs. Lashley, his surviving daughter ;) and even if there was any doubt upon the principle, the point is now so fixed by uniform authority, that it would be a dangerous precedent to throw it loose."

Judgment—"Adhere, except as to article of the 3 per cent. annuities, as to which order memorials."

Interlocutor 23d December 1791.

Question, Whether the Government Annuities were Heritable, in a
 Question about the Claim of Legitim?

LORD PRESIDENT CAMPBELL.—"The act itself, by which they (the government annuities) were established, declares them to be personal estate, which seems to be decisive of the question. It gives them a certain quality which must attach upon them throughout.

"The statute does not mean either to establish legitim in England, or to take it away in Scotland, nor does it inquire into the

physicians, &c. and the retailers of liquors made from malt, called *aqua vitæ*. The acts 17 Geo. II. c. 17, § 17; 24 Geo. II. c. 40, make further regulations; and in the last of which there is an express exception in respect of spirits distilled from malt, retailed and consumed in Scotland under the name of *aqua vitæ*. The subsequent acts 19 Geo. III. c. 25; 21 Geo. III. c. 17; 22 Geo. III. c. 66; and 27 Geo. III. c. 30, increased the amount of license duty; but they did not contain, as in the former acts, the express exemption or provision with respect to spirits distilled from malt. But by a subsequent act, 30 Geo. III. c. 38, § 2, the previous acts 16 Geo. II. and 24 Geo. II., and also the 21 and 22 Geo. III. were declared to cease and determine, and in room thereof other regulations regarding the *rate* of license duties were imposed. Nothing was mentioned with respect to spirits made from malt, called *aqua vitæ*, but there was a clause expressly declaring, "That all powers, authorities, rules, regulations, restrictions, exceptions, provisions, clauses, matters, and things which in, or by acts of parliament, in force immediately before the passing of the act for the regulating the retailing of the said liquors respectively, and *not being expressly altered, repealed, changed or controuled by this act*, or not being repugnant to any of the matters, clauses,

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consequences of the fund being personal. This is left to the common operations of the law. The loan was, in its original nature, personal, being money lent to government, and when it was found expedient to make a certain arrangement with respect to the duration of that loan, and of repayment of the debt, it would have been unjust had any change of its nature taken place, and accordingly this is expressly guarded against as one of the fundamental conditions of the transaction itself, by which these annuities are created.

"The case of the transferable bonds issued by Douglas, Heron and Company, under the sanction of an act of parliament, which declared them personal though heritably secured, is extremely similar. It has never been held that these were personal in the case of legitim, as well as to every interest and purpose whatever.

"As to the French annuities, the circumstances of them are not sufficiently explained by either party, and perhaps they ought not to be presumed to stand upon a different footing, unless it is clearly made out. At same time, from the French law, they seem rather to be held as immoveable."

Judgment—"Found the government annuities moveable, and falling under the legitim. Remit to Ordinary as to French funds."

Vide Lord President Campbell's Session Papers, vol. lxiii.

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 "and continue in full force." On this general saving clause
 PATRICK exemption was pleaded, under the previous acts, in favour of
 v. liquors made from malt, called aqua vitæ. But judgment
 HIS MAJESTY'S went out in favour of the plaintiff, His Majesty's Advocate.
 ADVOCATE.
 Dec. 7, 1791. Against the judgment of the Court of Exchequer in Scotland the present appeal was brought in the form of a Writ of Error.

Pleaded by the Appellant.—When the legislature has once created an exemption, exception, or provision, saving from payment of a tax, in favour of any particular article or description of persons, to which and to whom, independent of such exception or provision, the act imposing the tax would apply, and comes afterwards to increase or diminish the duty, or to regulate the exaction thereof, there is no necessity, in order to continue the exemption, that it should be verbatim repeated in the new statute. If the former act is *not repealed*, the exemption will remain in force without any new provision or express clause to that effect; and although the legislature, in remodelling such duties, may find it necessary to repeal the former acts, yet the exemptions or exceptions therein may be effectually renewed by a general clause, declaring, as is done in the present case, that all exceptions or exemptions in the former acts not hereby expressly repealed, shall continue in force; and therefore it is a position quite untenable, that all former exemptions in previous acts, not expressly renewed and inserted in the later act are to be considered as abrogated or repealed.

Pleaded for the Respondent.—The last act, 30 Geo. III. c. 38, repealed all former duties on excise licenses for retailing distilled spirituous liquors, and imposed a new duty in lieu thereof. This new duty is imposed in the most general words, "That *all* and every person or persons who shall retail distilled spirituous liquors;" and no exemption whatever is inserted in the act. The general saving clause in 30 Geo. III. can only be held to apply to the exemption in favour of physicians—the universities—the vintners' company in London, and other corporate towns, but not to the exemption applicable to liquors made of malt retailed and consumed in Scotland. Exemption was not to be implied or to be deduced by any inference from the words of the act. It must expressly appear, and cannot be admitted where the meaning of the legislature is not clear beyond all doubt. Besides, the reason which existed for the ex-

emption when the tax was first imposed no longer applies. The license duty then was £50 ; now, it is scarcely so many shillings. In the circumstances, it would be unjust to hold that the legislature meant to tax one class of retailers and exempt another. The principle, therefore, ought to hold, that wherever the exemption of the previous acts is not renewed by the later, they ought to be considered as virtually repealed.

After hearing counsel, it was

Ordered that the judgment in the Court of Exchequer in Scotland be *reversed*, and that judgment be given for the defender in the original action.

For Appellants, *Henry Erskine, Allan Maconochie, Wm. Dundas.*

For Respondents, *Arch. Macdonald, R. Dundas, Sir J. Scott.*

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[M. 7884.]

JAMES OGILVIE, Collector of Excise	.	<i>Appellant ;</i>
THOMAS WINGATE,	.	<i>Respondent.</i>

House of Lords, 13th June 1792.

LANDLORD'S HYPOTHEC — CROWN'S PREFERENCE — WHETHER CROWN HAS PREFERENCE OVER LANDLORD'S HYPOTHEC?—Held, in the Court of Session, the landlord preferable to the crown. Reversed in the House of Lords, and case remitted to inquire more particularly into the crown's title, and process whereby the effects in question were supposed to be subjected to the king's title.

James Burgess possessed a farm belonging to the respondent situated in Fife. He also carried on the business of a distiller and maltster ; and being in arrear with his distillery and malt duties, the appellant, collector of excise, obtained judgment against him for the duties due to the crown.

Thereupon the respondent, his landlord, sequestrated for the current rent of crop 1781, and warrant to sell was issued, when George Luke, excise officer, in virtue of the above judgment for the malt duties, attached the same subjects, and warned the landlord not to sell, as such was

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WINGATE illegal, after the proceedings of the crown. The landlord proceeded with the sale ; and action was then brought before the sheriff by the appellant, for the value of the corns thus sold. The sheriff gave judgment in favour of the respondent. In advocacy, the case was reported to the Court, who pronounced this interlocutor : “ Find that the “ landlord’s right of hypothec over the crop and stocking of “ his tenant cannot be defeated by the prerogative process “ of the crown, in virtue of the statute of 33 Henry VIII. “ as extended to Scotland by the articles of Union, and the “ act of parliament the 6th of Queen Anne ; therefore advocate the cause and sustain the defences pled for Thomas “ Wingate, assoilzie him from the conclusion of the libel “ and decern.”* On reclaiming petition the Court adhered.
- July 2, 1790.
- Feb. 1. 1791.

* Opinions of Judges.

LORD HENDERLAND.—“ This is a case of nicety. In the case of Campbell of Stirling, it was found that the goods being in the hand of a third party for payment of a debt, that this was good against a writ of extent and arrestment of these goods on behalf of the crown. Vide p. 24 of Information for Wingate.”

LORD SWINTON.—“ The sense of the country for the last 80 years past, has been against the king’s claim of preference. But the question is, whether the stock and crop are to be held as *tenant’s effects*? They are the proprietor’s, redeemable by the tenant on payment of his rent. The words real estate in the act mean not only heritable but moveable, in which there is a *jus in re*.”

LORD MONBODDO.—“ I think the landlord has not a property, but a hypothec only ; and the question having relation to the second sequestration only, I think the crown is preferable.”

LORD DREGHORN.—“ Even supposing them to stand in *pari casu*, and were both equal in execution of diligence, still the king would be preferable ; but the Court did not mean to take the right belonging to another, and therefore that right would remain good, e. g. a ship on which there is a bond of bottomry *transit cum suo onere*.”

LORD ESKGROVE.—“ The landlord’s right is a *jus in re*. I do not go upon the words of the act of parliament ; as I rather think it meant land estate. But the question is, What subjects is the crown to take in preference ? In my opinion, it is the subjects which any common creditor would take. N. B. In England, if distrained by landlord, no common creditor can take, but the crown can. The crown can only take the debtor’s right, in the same way that it was *ab ante* vested in another.”

LORD GARDENSTONE.—“ I think the crown preferable to all who

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—By the treaty of Union, England and Scotland were placed on a perfect equality

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are in *cursu diligentia*. The crown could not recover from a *bona fide* purchaser though the landlord can. The landlord's right is a completed right from the beginning, and the crown cannot take away any vested right by the mere force of its diligence or writ of extent, e. g. an assignation in security, duly intimated. But suppose the goods consigned, and a debt owing the assignee, the latter's right of retention cannot be defeated by the writ of the crown."

THE LORD JUSTICE-CLERK.—"I think the rights of real creditors remain the same as before, and the right of the landlord is a real one. The salvo in the statute is only of real estates. An estate in England may consist of an interest in any subject, but the crown will not for the debt of A. distrain the effects of B. The landlord has a stronger right in Scotland than in England. Suppose an *estate mortgaged*, can the crown defeat the mortgage? Suppose money is deposited in the hands of a banker and money advanced, can it defeat the banker's right of retention? I think not."

LORD HAILES.—"Referred to the state of Scotland at the time of Union."

LORD JUSTICE-CLERK.—"It is difficult for us to say what is the law of England on the subject. But let us compare this with other rights where the crown is postponed. I am clear as to the mortgage, because it is a real right vested in another, and not the estate of the debtor. The same rule as to actual pledge. Hypothec is a *tacit pledge*. It is a real right; and gives a right to detain and bring back even against purchasers. The case mentioned of a ship, stands on the act of law, not on the convention of parties; for the act of the party could not alter the law of the land. Traditionibus non dominium (audis pactis?) transferuntur rerum dominia."

LORD SWINTON.—"King's preference a new idea. Never thought of before."

LORD DREGHORN.—"Of same opinion. The landlord has an effectual security, which is next to payment. See the close of Mr. Wood's opinion. In the case of the landlord, it is a contract of pledge implied by the law. It is also founded on the principle of retention—the tenant's possession being that of the landlord."

LORD DUNSINNAN.—"Of the same opinion."

LORD ESKGROVE.—"Of same opinion. The act 6 of Queen Anne seems only declaratory of what was already settled by the treaty of Union itself. The *salvo* as to *real estate* is thrown in not as an exception, but in order to save existing rights, which were not meant to be touched. This exception ought to have a liberal construction.

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in matters of revenue; and consequently, in every case where the crown is preferable in matters of debt to the subject in England, it ought also to be preferred to the subject in Scotland. “By the 6th article of the treaty of

The sense of the country, and king’s council, ever since the Union, has been on the side of the landlords’ right in Scotland. Landlords’ rights in England has varied from time to time; and the best part of it is, the landlord’s right has been preferred since the Union.”

LORD HAILES.—“The nearest thing to a right of pledge is the landlord’s right of hypothec, and therefore I am for preferring him as a pledgee. The claim of the crown, however, is not new. The history of the Union not well understood; and we are liable not to take into view the miserable state of the Scots tenantry at that time. They were in a general state of bankruptcy, and the only security for a landlord was the tacit hypothec; and even this would not have been given up without opposition.”

LORD HENDERLAND.—“I think the landlord is entitled to his preference against the crown.”

LORD PRESIDENT.—“I am of the contrary opinion, and for preferring the king’s writ of extent.

“The question is, whether the landlord’s right of hypothec, or the king’s debt upon a writ of extent is preferable, the goods being *in medio*?

“This is not left to the law of Scotland alone, for by the act 6 Anne we must have recourse to the law of England in all questions regarding the king’s preference. There is nothing extraordinary in this. It is the same in Treason law.

“Care was taken to make an exception of real estate, as the great security of our records, &c. depended upon the adherence to our own feudal establishment. But personal estate was not thought of equal consequence.

“The present question regards the effects of a tenant which are in their nature moveable or personal estate, viz. horses and cattle; and the same question would apply to *invecta et illata* in an urban tenement. They are said to be hypothecated for landlord’s rent, i. e. the landlord has certain legal remedies for recovering his rent out of them of a more beneficial nature to him, than those of any common creditor.

“A superior also has such remedies for his feu duties, and even a real creditor infeft, by poinding the ground. But how far these remedies operate in competition with the crown, is the question.

“1. Take a view of the law of England, then of Scotland, as to the landlord’s remedy. The two laws are somewhat different, but not more than was to be expected from the two countries being independent, having different legislatures, and different jurisdictions

“ Union it is provided, that they shall be under the same prohibitions, restrictions, and regulations of trade, and liable to the same customs and duties on import and exports, &c.” By the 19th article it was provided, “ that

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and forms. Suppose the origin to have been the same, and that they set out from the same point, they would naturally diverge.

“ Rent charge in England and in Scotland was originally the same. See Kames' Law Tracts, vol. i. 241 ; and at present their mortgage and our personal bond have the same object, though the forms are different.

“ The administration of personal estate assumed by the clergy in both countries, had the same source, and conducted in nearly the same manner. It is still nearly akin in both, attended with some variations in form and practice. I doubt if this variation be such as would affect any question arising upon the king's preference.

“ In England, so early as *magna charta*, upon the death of the king's debtor, the king had a right to have his debt first paid, 9 Hilary 3, cap. 18. It is presumed this is still the law of England, and if so, we are bound by the act 6 of Queen Anne to receive it here.

“ What preference the king had with us before the Union is not clearly ascertained. Probably he stood upon the same footing with the Roman fisk.

“ Certain debts are held to be privileged. See Instructions to Commissaries, Acts of Sederunt 1666 ; and among these, duties of lands for a year.—Funeral expenses, and physician's fees are omitted, yet these have always been held preferable, and in the first rank ; see Kilkerran, p. 136, 29 June 1742, Cowan v. Barr, *Creditor funeralium*, (funerarius ?) found preferable to landlord for rent. No mention is made of the king. But if the king be preferable to other creditors chirographari, such as furnishers to burial, &c., he must *a fortiori* by that decision, be preferable to the landlord, who is truly a creditor by special contract only, though with us said to be *hypothecarius*.

“ The landlord's situation in England is fully described in the English opinions produced and authorities referred to. He can by a summary proceeding at his own hand, distrain for the whole arrears. This is called distress ; and by act 2 Wm. and Mary, c. 5, extended to power of apprising and selling at sight of sheriff or constable, and extended to corns reaped.

“ As the law therefore stood at the Union, the landlord's powers in England were very ample and effectual as to arrears, and when goods were impounded, they were in custody of the law, from which they could not be taken by any common creditor.

“ The author of Bacon's Abridgment says that this was a *hypothecation*. Voce *Distress*, vol. 2, p. 105 ; and vide preamble of said act Wm. and Mary, where it is said that goods are detained as *pledges*.

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“ there be a court of Exchequer in Scotland for deciding
 “ questions concerning revenues, customs, and excise there,
 “ having the same power as in England.” By 6th Anne, it
 was declared that debts to be paid to Her Majesty in Scot-

“ What stronger lien could there be, when, by common law, they might there be detained for ever till the rent was paid, and by statute might be sold, if not redeemed, like a pledge, yet the king’s prerogative prevailed.

“ By act 8 Queen Anne, c. 14, a *tacit hypothec*, in the proper sense, was created for a year’s rent, so that the law of England now stands very nearly on the same footing with ours ; yet this makes no difference as to the king’s right.

“ By the common law, property must be actually changed to exclude the king ; there must at least be a *special property* vested, such as a pawn or pledge delivered, or a ship mortgaged. See case in Par. Ker’s Reports, p. 112, *King v. Cotton*, where the question with the landlord is fully discussed.

“ A *tacit hypothec* or lien, which is no other than a *preference* or privilege given by law, will not answer the purpose, no special property being thereby vested, as by the covenant of parties, and actual delivery of the subject.

“ As to the law of Scotland, what we now call hypothec, seems anciently to have been precisely a distress, and nothing more. See Kames’ Law Tracts, vol. i. p. 240, &c. and Information for the pursuer, p. 22.

“ Afterwards we chose the Roman law word *hypothec* ; but the substance is the same.

“ I am clear that the property of goods on the ground, and corns, reaped or unreaped, is in the tenant. They are the fruit of his industry ; and Mr. Wood’s idea as to the corns being the property of the landlord, is not well founded ; but it was an implied condition in the Roman Emphyteusis, and in all feudal grants, that if the heritable tenant failed in payment of the reserved rent or feu duty to the landlord, there should be a power of re-entry, and of seizing upon the subject itself, as well as every thing upon it. This was the case if the Roman tenant was three years in arrear. This right fell to the ground. Same with us if vassal was two years in arrear. But the aid of the law was necessary to give it effect.

“ It was also understood, that if the right of the vassal was not irritated, the superior had a remedy by a species of *real* action, called *poinding the ground*, i. e. the goods on the ground. He remains infest in the lands, and has a supereminent right to the rents, which he makes effectual in this manner. Perhaps the lands are in the natural possession of the vassal. There are no *rents* therefore, but only *fruits*, which he lays hold of, as preferable by his infestment.

land were to be of the same force and effect as such obligations in England, by virtue of the royal prerogative, and that such debts, suits, and prosecutions, were to be preferred, in virtue of the said 33 Henry VIII., “ and shall have and en-

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and excludes any arrester or common poinder. This was extended in practice even to other goods on the ground, not that they are hypothecated in the proper sense of the word, but that the superior re-enters by the aid of the law, and takes what he can find.

“ It was extended also to the case of a liferenter, or other real creditor infest.

“ Suppose a competition between the king and a poinder of the ground, by the act of Queen Anne the latter, so far as his infestment goes, is preferable upon the *lands* and rents, and consequently on the *fruits*, if in the natural possession of the proprietor. But what preference could he claim upon the *moveable goods*, such as cattle, &c., in which he is not infest, and upon which there does not even seem to be any such idea as a hypothec?

“ As to the case of landlord and tenant; 1. Both fruits and stocking are the tenant’s property. 2. They are in his possession till the master applies to the judge Ordinary, or perhaps his own baron Bailie, to sequestrate them, which is another word for *impounding* them. But this is no more than putting them in the custody of the law, founded on the same kind of antecedent right that a landlord in England has, which is a right to distrain and to recover, &c., with which no common debtor can interfere, though the goods are *in medio*, but with which the king can interfere, because his right is supereminent. It was decided long ago that the king was preferable to all common creditors. See Dict. *voce* King. The only puzzle here is, that the landlord is said to be *creditor hypothecarius*. But this term, when applied to the personal property of the debtor, and in possession of the debtor, means, in common sense, no more than that he is a privileged or preferable creditor, which the king also is, and the short question is, which of these two ought to prevail?

“ If there be any doubt upon the construction of the law, or upon the resemblance between the rights of the landlord in England and Scotland, we must have recourse to analogy, and to that construction which will bring the two as nearly together as possible, and in this point of view, the reasoning from the case of Gordon of Park is very strong.

Vide ante,
vol. i. p. 558,
et 562.

“ If these goods could be said to be a real estate in the tenant, the act of Queen Anne would determine the point. But they are clearly a moveable estate in the tenant. As to the case of a ship hypothecated for repairs, it is not a tacit pledge or hypothec, but an actual pledge by contract of parties, and delivery made by some symbolical form. It is an awkward circumstance that we should take to our-

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“ joy such and the same prerogatives, as well in the plead-
“ ings, as in the lands, tenements, debts, credits, and spe-
“ cialties, goods, chatels, and personal estate ;” provided
“ that no debt or duty shall affect or subject any real estate

selves in Scotland, a right against the king, which the landlords in England have not. The only pretence for it is, that we consider the landlord's hypothec in Scotland to be of the nature of a real right, and therefore similar to a *special property* in England, though the landlord's remedy in England is not so. This, however, is judging more upon the apparent effect of the right, than upon the true nature of it. In the case of steelbow leases, where the landlord delivers over so many head of cattle to the tenant, taking him bound to redeliver the same, or an equal number and of equal value, at the expiry of the lease, the landlord is understood to have a special property in the *universitas gregis*, by which no creditor of a tenant would be entitled to interfere. But, in common leases, where the tenant provides his own cattle, and stocks the farm himself, all that can be said is, that the landlord is a preferable creditor for payment of his rent, and so is also the king for debts due to him. Had we not adopted the words hypothec, which conveys the idea of a regal right, the question would have been attended with less difficulty.

“ It has been shown, that corns and cattle upon the ground are not real estate in the tenant, and as little are they a real estate in the landlord ; and therefore the words of the act of Queen Anne do not in any sense reach the case.

Vide ante,
vol. i. p. 594.

“ Real estate, in the sense of the statute, probably means heritable estate, though even an heritable right, e. g. a disposition to lands does not, in a strict legal sense, become real till it is completed by infestment ; and, in general, the idea of the legislature was, that our feudal rights in Scotland, and the modes of conveying and granting securities upon them, should not be disturbed, and this alone was the question at issue in the case of Burnet against Murray, 17th July 1754, about the effect of adjudications upon a land estate for the king's debt and a common debt.

“ But a mere moveable subject, such as a cow or a horse, never passed in the language of our law by the name of *real estate*. It is neither heritable or real, but *moveable*, though, at the same time, the property of it is a *jus in re*, or real right, and produces a real action for recovery, similar to the *rei vindicatio* of the civil law, and the action of detinue or trover in the English law. There are likewise real rights and real actions of an inferior nature to those arising out of property, such as in the case of pledge ; but a moveable thing pledged, never was spoken of in the law of Scotland as a real estate.” See Erskine.

Vide President Campbell's Session Papers, vol. lxi.

“in Scotland.” These being the explicit provisions of the act in regard to the debts of the crown being placed on precisely the same footing as in England, a sequestration by the landlord, or the landlord’s hypothec in Scotland, can be in no better situation than the distress warrant in England. There is no specific difference between the landlord’s distress warrant in England, which cannot compete with the crown’s debt, and the landlord’s hypothec; and therefore the latter cannot be preferable to the crown in Scotland. Certain debts, termed privileged debts in the law of Scotland, such as physician’s fees, servants wages, &c., are all preferable to the landlord’s hypothec. But, in a question with the crown, these privileged debts have no preference. To give, therefore, the landlord a preference over the crown debts, as is done in this instance, is placing his hypothec in a better position than ever before it enjoyed, and making his right be preferable even to privileged creditors. Nor is it any answer to this to say, that substantially the landlord’s hypothec is a real right of property in the thing, and therefore not attachable by the crown for a debt due by the tenant, because, in point of fact and law, the right is no more than a pledge in the hands of the tenant.

Pleaded for the Respondent.—By the law of Scotland, the landlord has an absolute real right of property in the crop upon his ground, until the year’s rent for which it is the crop be paid, which, as it could not be defeated by the tenant selling the crop, so could not be defeated by his debtor, the crown. By the law of England, a pledge, or even the hypothec on a ship for foreign affairs, defeats the crown’s right of preference; but the landlord’s hypothec in Scotland is equal, if not paramount, to a pledge in England, and therefore the landlord’s hypothec ought not to be defeated by the right of preference secured to the crown by the act Henry VIII. There is no analogy between the distress warrant for rent in England and the landlord’s hypothec in Scotland. The former proceeds on the footing of the effects being the tenant’s *ab initio*, but the latter is founded on a real right in the crop—a property already belonging to the landlord, and of which he cannot be deprived. It is a real estate; and the act 6 Anne founded on, expressly exempts real estate in Scotland from the operation of the crown’s preference. The present is the very first attempt ever made in Scotland to deprive the landlord of

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his hypothec, by an alleged preference over it on the part of the crown.

After hearing counsel, it was

Ordered and adjudged that the said interlocutors complained of in the said appeal, in so far as they declare generally "That the landlord's hypothec over the crop and stocking of his tenant cannot be defeated by the prerogative process of the crown, in virtue of the statute of 33d Henry VIII., as extended to Scotland by the articles of Union, and the act of parliament, the 6th Queen Anne," be, and the same are hereby *reversed*; but in respect that the king's title does not sufficiently appear in the process, it is further ordered, That the said cause be remitted back to the Court of Session in Scotland to inquire more particularly into the process, and the conduct thereof, whereby the effects in question are supposed to have been subjected to the king's title.

For Appellant, *A. Macdonald, R. Dundas, Sir J. Scott, W. Dundas.*

For Respondent, *T. Erskine, Henry Erskine, Alex. Wight, D. Cathcart.*

NOTE.—Professor Bell says:—"It is believed that no argument was delivered at pronouncing this judgment of reversal;" but the eminent judge who then presided in the House of Lords made very full and minute inquiry into the condition of landlords, and the nature of their rights in the two countries; and although, perhaps, a distinction might have been found between them, it was held, that the great and governing principles which regulated the decision of Gordon of Park, on the effect of the treason laws in England, as extended to this country, ought to dictate the decision in such case; and that, taking the analogy of the landlord's right in both countries, the point was to be so decided, as to give the landlords in Scotland no superiority over those of England."—Com. vol. ii. p. 55.

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ARCH. DUFF, Sheriff Clerk of Elgin,

Appellant ;

JANET HENDERSON, only lawful Child of the
deceased John Henderson, Writer in El-
gin, and JAMES YOUNG, Manufacturer in
Elgin, her Husband, - -

Respondents.

DUFF
v.
HENDERSON,
&c.

House of Lords, 7th Feb. 1793.

TUTORS AND CURATORS—LIABILITY—INVENTORY.—Circumstances in which tutors and curators appointed by the father's will (with exemption from liability *singuli in solidum*, and for omissions,) were held liable conjunctly and severally, they not having made up inventories. Also held liable in damages for removing the infant ward from the lease of the farm and mill of Ortown, and decrees of removing reduced. £200 costs awarded in the House of Lords on affirming the judgment of the Court of Session.

This was an action raised against the tutors and curators appointed by the respondent's father, at the instance of the respondent, setting forth that her father had left sufficient and ample means, both in heritable and moveable property, and had appointed tutors and curators to the respondent, of whom the appellant was one, and the acting tutor for the whole : That after her father's death these tutors and curators had taken the management of her affairs, and intromitted with her means and effects, without giving up either tutorial or curatorial inventories, as required by law. That they at least would not make furthcoming the inventory of the moveable estate of the deceased, specially referred to in his will ; and that the appellant, as factor and manager for the Hon. Arthur Duff of Ortown, had improperly removed the respondent and her subtenants, from the Mill and Mains of Ortown, leased by her grandfather from Mr. Duff, in virtue of decree of removing obtained before the sheriff.

It was farther stated, that Archibald Duff had allowed this removing to be accomplished to favour the Hon. Arthur Duff, while he well knew that the said Arthur Duff was owing the deceased the sum of £300, by bill, to payment of which, she had sole right ; and that if the arrears of rent due by the subtenants had been duly collected by him, as tutor and curator, and agent in her affairs, there would have been

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- no occasion for removing her for nonpayment of rent: Therefore the summons concluded that the tutors and curators ought to be decerned and ordained to produce the said inventory referred to in deceased's will, and to make payment to the respondents of the amount thereof; and in case the said inventory should not be produced, they ought, conjunctly and severally, to make payment to her of the sum of £700, or whatever other sum the said respondent should instruct the said John Henderson died possessed of.
- All the tutors and curators allowed decree to go out in absence against them except the appellant.
- In defence, it was stated, That the libel concluded against the whole tutors conjunctly and severally, while by the will of the deceased, it was declared that each should be liable for his own acts and receipts only. The Lord
- July 17, 1787. Ordinary pronounced this interlocutor on this point: "In regard the defenders, Archibald Duff and James Henderson, do admit their having accepted and acted, and that they have not made up inventories in terms of law, finds that they are liable, conjunctly and severally, to account in terms of the libel." On two several representations against this interlocutor the Lord Ordinary refused. And, on reclaiming petition to the whole judges, it was unanimously refused.
- Nov. 13 & 17, 1787.
Jan. 31, and
July 8, 1788.
- The above summons having contained conclusions of reduction to reduce the decrees of removing which had ejected her from the Mains and Mill of Ortown, the Court further pronounced this interlocutor: "Sustain the reasons of reduction of both decreets of removing against the pursuer, and find the defender, Archibald Duff, liable in damages and expenses to the pursuer for his improper conduct, and remit to the Lord Ordinary to proceed accordingly."
- Dec. 16, 1789.
- On reclaiming petition, this interlocutor was adhered, in
- June 1, 1790. so far as regards reducing the decrees of reduction. "But, before answer as to the other points in the cause, allow the petitioner, Archibald Duff, a proof of the articles 5th and 9th and intervening articles of his condescendence, and to the respondents a conjunct probation, reserving to both parties all objections competent against the witnesses to be adduced by either of them, as accords."
- The purport of these articles was to the effect, that it was the unanimous opinion of the whole tutors and curators, after the death of John Henderson, that the lease of the

Mill and Mains of Ortown could not be of any use to an infant, and they therefore resolved to raise a removing. This, however, was not proved. After the proof was concluded, the Court pronounced this interlocutor: "Adhere to their interlocutor 16th Dec. 1789, finding the said Archibald Duff liable to the pursuers in damages and expenses; and refuse the desire of the reclaiming petition as to that point; modify the damages to £5. 16s. 8d. sterling yearly as to the Mill of Ortown, and to £2. 5s. like money, as to the Mains; and find the defender liable to the pursuers in both these sums during the years remaining unexpired of the lease when the decret of removing was obtained." On reclaiming petition against this interlocutor the Court adhered.

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Feb. 17, 1792.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—As the appellant, and the other tutors and curators, were appointed by the father of the respondent, with a declaration that they should not be liable for omissions, nor *singuli in solidum*, but each for his own intromissions and commissions only, they could not be held liable, because the statute 1696 makes it lawful for a father to appoint guardians to his children with such exemptions; and declares that guardians so appointed shall not be liable for omissions, nor the one for the others. The provision in the statute, that nothing in the act contained shall liberate from or dispense with the making up of inventories, does not declare that guardians omitting to make up inventories shall be subject to the penalties annexed to such omission by the act 1672; at any rate, it is none of the penalties inflicted by that statute, that guardians shall be liable *singuli in solidum*; the appellant, therefore, can at most, be subjected only for his own omissions and commissions, but not for the omissions and commissions of the other guardians. 2. As to the damages awarded against him for the removing, the respondent has brought no evidence of the allegations upon which this claim is founded. Besides, it was clearly for the interest of the respondent to get quit of the farm and mill, and she has sustained no damage by these decreets of removing.

Pleaded for the Respondents.—1. The interlocutors finding the appellant and the other tutors liable jointly and severally, for whatever charge might be fixed upon them in the present suit, are clearly founded on the law of Scotland,

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which it is unnecessary to state at length on this head ; but reference may be made to Mr. Erskine's Institute, B. i. tit. 7, § 27. The exception there mentioned to the general rule, " That tutors are liable *singuli in solidum*, of those who are named by the father, as allowed by the act 1696, c. 8, with a special proviso that each tutor shall be liable only for himself, and not for others, under which the appellant attempts to shelter himself, cannot aid him, because that act contains an express declaration, " That nothing therein contained shall liberate from or dispense with the making of " inventories," as required by the act 1672, c. 2. And that act again declares, That no tutor shall have authority to exercise the office till an inventory is made. As the appellant and his co-tutors neglected to make up inventories, they are in the same situation as if they had not been named by the father, and had illegally intromitted ; and consequently each of them must be answerable for the acts and deeds, receipts, and omissions of the whole. 2. As to the damages arising from the conduct of the appellant in conspiring to oust his infant ward of the farm and mill of Ortown, these are justly due, because it was the duty of these guardians to preserve the lease of these for her interest and behoof. And it was illegal in them to eject her therefrom in the circumstances and manner they did, seeing that many years of the lease had then to run. But if the guardians really thought that it was not for the interest of the ward to keep the lease, the proper course was to have tried to dispose of it ; and it is in evidence that they might then have got a premium for it. The truth is, that the appellant being factor for the landlord, he had availed himself of his situation of tutor, to detect and discover a flaw in the lease, and thereby to take advantage of it in the manner that was done.

After hearing counsel,

LORD CHANCELLOR THURLOW,—After a few remarks animadverting on the appellant's conduct,—said :

" Instead of acting the part of a parent to this family the appellant had taken the advantage of the knowledge of their circumstances which his situation enabled him to acquire, to distress and impoverish them. Without entering into the validity of the objections which had been made to the deed of lease in question, and the connection which subsisted between the different parties in the cause, it was clear the relation in which he then stood towards them ought to have prevented the appellant from taking any advantage of them.

The Court of Session, instead of having done too much for the respondents, had awarded them little more than a fifth of what was their due. As a punishment on the appellant for the part he had acted, he would move that the appeal be dismissed with £200 costs." 1793. IRVINE, &C. v. VALENTINE.

It was therefore ordered and adjudged that the interlocutor complained of be affirmed, with £200 costs.

For Appellant, *W. Grant, W. Tait.*

For Respondents, *Sir J. Scott, J. Anstruther.*

SIR ALEX. RAMSAY IRVINE, & ROBERT KINNEAR, *Appellants ;*
ALEX. VALENTINE, - - - *Respondent.*

House of Lords, 4th March 1793.

LEASE—ASSIGNEES—SUSPENSION—COMPETENCY.—A Lease was taken to the tenant, his heirs and assignees, such assignees to be approved of by the landlord. On assigning the lease :—Held that the landlord was not entitled to impose new and more ample conditions in his own favour in giving such consent or approval. A decree of reduction having been extracted, and suspension brought of that decree ; Held that suspension of a decree *in foro* of the Court of Session was incompetent.

The respondent obtained leases of the farms of Easter and Wester Pitgarvie, the latter of which originally belonged to him. The leases were for a term of 19 years, and thereafter for the life of the person then in possession. They were both taken to Alexander Valentine, his heirs and assignees (such assignees being always agreeable to, and approved of by the said Alexander Ramsay Irvine, his heirs and successors, by a writing under his or their hands to that effect). And certain conditions as to cropping and enclosing and fencing were laid on the tenant, and also binding him " to take the advice and direction of the said Alexander Ramsay Irvine and his foresaids, as to the fences to be put upon said possession. And for the said Alexander Valentine and his foresaids, their encouragement in carrying on the said ditches, Sir Alexander Ramsay obliges

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“ himself and his foresaids to advance money from time to time.”

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Having obtained these leases at a small rent of £100, the tenant laid out considerable money in building new offices, and enclosing and fencing.

In consequence of these outlays he was under the necessity of obtaining a loan of £300 on the security of the leases. When this transaction came to be completed by deed, the landlord having inserted a clause of absolute renunciation of the leases, he refused to sign it. Thereafter, and of his own accord, the landlord caused an advertisement to be inserted in the newspapers, calling upon the tenant's creditors to lodge their claims with him, stating to his agent by letter: “ I shall soon send you the substance of an agreement betwixt Mr. Valentine and me, to be executed in form; whereby I am to pay off his debts and take his farm for certain under my management, for my reimbursement; and if all his debts are not extinguished (which will then be in my person) within a limited time then the farm is to devolve to me, and the lease will be at an end. But my name is not to be mentioned in the advertisement.” The advertisement appeared; but, in consequence of its damaging the tenant's credit, he was obliged to become bankrupt. He executed a trust deed empowering trustees to dispose of the leases. At a meeting of his creditors, the leases were agreed to be disposed of by public auction, the appellant appearing as a creditor at the meeting, acting as preses, and signing the minutes.

This minute, so signed by him, was in the eye of law, an unconditional consent to the sale of the leases. Afterwards, however, the appellant was pleased not so to consider it; and a few days before the sale he transmitted a series of conditions, which he insisted to be imposed on the purchasing tenant before he would consent to the same. These were, 1. That the tenant shall reside on the farm, and have no other residence, and no other farm. 2. That the tenant shall find security for five years' rent, and for the stocking of the farm. 3. Half of the arable land upon the farm laid down with grass seed with the first crop, and to continue in grass for four years. 4. That the tenant shall support the hedges, and leave them in a suitable condition on removal.

These conditions were new, and not such as were contained in the lease to be sold. They were, besides, such as prevented competition at the sale, as was proved by those

who attended. The result was, that after adjournments, the price was reduced to £200, and the appellant having offered that sum, became the purchaser. The conditions, of course, could not affect him; but the tendency of them was to deter competition, in order that the lease might be thrown on his hands. Soon thereafter he let the said farms to Kinnear, at a rent of £180 per annum for 38 years. Upon which the present action of count and reckoning, and reduction and removing was brought against both Ramsay Irvine and his tenant Kinnear. The reduction being applicable to Kinnear's lease.

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The Court unanimously “Sustain the reasons of reduction in so far as regards the defender Sir Alexander Ramsay Irvine, and reduce, decern, and declare accordingly; Find him accountable to the petitioner for the profits of the farms of Easter and Wester Pitgarvie since the date of his purchase, after allowance of the £200; and remit to the Lord Ordinary to hear parties' procurators on the amount of these profits, and to do as he shall see cause; And further find that the defenders, Sir Alexander Ramsay Irvine and Robert Kinnear, must remove from the said farms at the term of Martinmas next, and decern.” On reclaiming petition the Court adhered.

June 30, 1791.
July 9, 1791.

This decree being extracted, a suspension was brought, which the tenant contended was just a renewal of the same cause of discussion, and his counsel (the late Lord President Hope) pleaded: “If such proceedings were tolerated, for the future your Lordships must sit like Sybils writing your oracles upon leaves, and scattering them to the winds,

—————Foliis tantum tu carmina mandas
Et turbata volant rapidis ludibria ventis.

Your decrees, instead of being the grave of disputes and of animosities, will give birth and fresh vigour to every species of contention; and the rights of the people will be unhinged by those very means which, in this and every other country, have been intended to foreclose and secure them for ever.” The Court held that a suspension of a decree *in foro* was incompetent.†

Feb. 28, 1792.

* Written pleading in Session Papers.

† Opinions of Judges.

LORD PRESIDENT CAMPBELL—“The instrumentum novitur repertum makes no difference. The missive, which is not in Valentine's handwriting, must have been drawn by Sir Alexander's direc-

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Against these interlocutors the present appeal was brought to the House of Lords.

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Pleaded for the Appellant.—The respondent's estate having been sequestrated under the bankrupt statute, he di-

tion, is shortly expressed, with a reference to the lease of the other farm ; and it is not pointed in the same manner as in the Information. But supposing the intention at that time to have been, that assignees should be simply excluded, the inference is rather against Sir Alexander, such intention having been departed from when the lease was extended.

“ Even if assignees had been simply excluded, the lease contains no irritant clause in case of assigning. Sir Alexander could only, therefore, have insisted that the assignees should not possess, but that the possession should be held by the tenant or his heirs ; and it is doubtful whether subtenants would have been excluded, as the mis-sive shows that the farm was actually then possessed by Valentine and his subtenants, and in leases of such long endurance, exclusions should not be implied. It is doubted whether the decision, *Alison v. Proudfoot*, 22d Jan. 1788, (Mor. p. 15,290), goes to such a case.

“ But the present lease does not simply exclude assignees ; on the contrary, it admits them, with a proviso of their being such as the landlord should approve of ; and there is a subsequent clause, which evidently shows that an arbitrary power of rejecting could not be meant,—the lease, after 19 years, having been taken for the lifetime of the person then in possession, without distinguishing whether such person was the original tacksman, or his heir or assignee. He might happen to have no heirs who could succeed to him by law without special destination, or, in other words, assigning the lease, so as to give effect to this clause, of adding a life to the 19 years.

“ The lease was entered into of the same date with the sale ; they were *partes ejusdem negotii*, and every stipulation in favour of the tenant is to be considered as a part of the purchase money. If one may judge from the high rent which Sir Alexander got from the new tenant, after keeping the farm one single year in his possession, and laying out, as he says, £60, besides that year's rent, in summer fallowing and draining, it seems plain that he made a very easy purchase of lands, and it is not to be presumed that Valentine would have sold them upon any other terms than securing the possession at a moderate rent for 19 years, and a life thereafter. A simple and unqualified exclusion of assignees is easily understood. But when other words or clauses are thrown in, we must have recourse to the probable intention of parties, and to evidence arising upon the face of the transaction, to discover what was meant. Every such case must depend on its circumstances, and therefore the decisions referred to by Sir Alexander do not apply.

vested himself of the leases in question, by a regular deed of conveyance to the trustees for his creditors, giving them a complete power to sell. The trustees sold the leases by auction, in a manner exactly conformable to the respondent's deed, with concurrence of the creditors, after regular advertisements and repeated adjournments. The leases are therefore gone from him for ever; and what remains with him is only an interest, entitling him to call the trustees to account. By the conception of the lease to the respondent, the landlord reserved to himself a negative against assignments; and the necessary consequence of this was, that if he gave his consent, he was entitled to qualify it with new conditions different from those in the lease sold.

Pleaded for the Respondent.—It did not follow because the landlord had reserved to himself a power to approve or disapprove of assignees, that in giving his consent he was entitled to couple that consent with new and unfavourable conditions, for such would, in substance, entitle him to make a new lease altogether, entirely beneficial to himself, and different from the original right. In the present case, the conditions imposed materially altered the lease, and affect-

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“ Besides, Sir Alexander, at the meeting 30th May, having acted as preses, did expressly concur in the measure of a sale of the leases, and it is frivolous to say, that he concurred only as a creditor, and did not mean to consent as a landlord; or to attempt, by parole evidence, to prove that he annexed conditions which were not specified in the minutes. Had he not consented to the sale, and had it been understood that there was any doubt of the tenant's power to assign, it was in the power of the creditors, and their trustees, to have enabled him to continue the possession whether Sir Alexander would or not.

“ Sir Alexander's conduct at the after meetings, in beating down the upset price, and deterring offerers, by adding very severe conditions, and thereby new modelling the lease altogether, had evidently the effect of throwing the farms into his own hands at a great under value, to the prejudice both of the tenant and his creditors.

“ The proof engrossed in the former papers shows clearly how this stands, and the lesion is clearly instructed by his own state annexed to the Information, where, after screwing up the supposed outlays, with interest, &c., he is obliged to make a considerable surplus rent.

“ Tacks are more favourably constructed (construed?) now for tenants than formerly. Kaimes' Rem. Dec. 4 Dec. 1747, Elliot.”

Vide President Campbell's Session Papers, No. 65.

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ed the sale thereof so much, as to deter any one from buying it except the landlord, in whose hands the conditions would fall to the ground. The lease was for 19 years, with an eventual liferent of the farms to the person in possession at the end of that period. The power therefore granted of assigning with the landlord's approval, could not entitle him, on granting such consent, to insert arbitrarily additional conditions, altering entirely, and depreciating the value of the lease to be assigned. Besides, the minute signed by the appellant, as preses of the meeting of his creditors, by which he gave an unqualified consent to the sale, ought not to have been receded from, by subsequently insisting or inserting in the articles of roup these oppressive conditions, which deterred purchasers from buying, and tended to force the leases into his own hands, by all which he was enabled to let the farms to Kinnear at an increased rent of £180 per annum. The whole transaction is therefore reducible, and he entitled to redress.

After hearing counsel, it was

Ordered and adjudged that the said interlocutor of the 30th June 1791, complained of in the said appeal be varied, by inserting after the word ("cause,") the following words ("without prejudice, however, to any claims or demands which may be competent to the creditors of the respondent, or to the said Sir Alexander Ramsay Irvine merely as creditor, and to their trustees in respect thereof"); and in respect that the said Robert Kinnear appears not to have been yet heard for his interest before the Court of Session or the Lord Ordinary: It is therefore further ordered, That the said cause be remitted back to the Court of Session to hear parties upon the said interest of the said Robert Kinnear; and in respect that in case of judgment passing in favour of the said Robert Kinnear, the privity and relation which may thereupon be found to subsist between Sir Alexander Ramsay Irvine and the said Robert Kinnear, may appear to make some difference as to the mode and form of redress which may be competent to the pursuer, Alex. Valentine: It is further ordered and adjudged, That the said consideration of the case be, in like manner remitted back to the said Court of Session. And it is further ordered and adjudged, That in the meantime the said interlocutor be *reversed*, in so far as it finds that the defenders, Sir Alex. Ramay Ir-

vine and Robert Kinnear, his tenant, must remove from the said farm at the term of Martinmas then next, without prejudice, however, to any point which may arise thereupon; and that, with these variations, the said interlocutor be affirmed; and it is further ordered That the said appeal be dismissed as to the said interlocutor complained of, dated the 9th July 1791, but without prejudice to the several matters herein before remitted, or to any consequence which may arise from thence: And it is further ordered and adjudged, That the said interlocutor of 28th February 1792, complained of in the said appeal, be and the same is hereby affirmed, without prejudice to any other questions which may arise.

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For Appellants, *W. Grant, Thomas Macdonald.*

For Respondent, *Allan Maconochie, Wm. Tait, Chas. Hope.*

The Right Hon. BASIL WM. DOUGLAS, com- monly called Lord Daer, Eldest son of the Earl of Selkirk, - - -	} <i>Appellant;</i>
The Hon. KEITH STEWART and Others, Free- holders of the Stewartry of Kirkcudbright,	} <i>Respondents</i>

House of Lords, 26th March 1793.

MEMBER OF PARLIAMENT.—Held the eldest son of a Peer ineligible to be elected a Member to sit in the Commons House of Parliament.

The present question relates to, Whether the eldest son of a peer can represent a Scotch county in the British House of Commons?

The appellant, conceiving he had such a right, lodged his claim for being enrolled a freeholder of the Stewartry of Kirkcudbright, at Michaelmas head court in 1791, in respect of his standing infest and seized in the lands of Over Mains of Twynham of 50s. old extent, by charter or grant from the crown, and other titles set forth in his claim, and exhibited at the meeting.

To his right to be put upon the roll, it was objected, That the claimant, being the eldest son of a peer of the

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realm, is incapable of being enrolled as a freeholder, or of electing, or being elected, a member of parliament.

The appellant having given an answer satisfactory to a majority of the freeholders, his name was put on the roll of freeholders by their order. But against this order the respondents complained to the Court of Session, in terms of the act 16 Geo. II. c. 11.

They contended, that by the law and constitution of Scotland, the eldest sons of the peers of parliament, were considered as of an order different from the commons or freeholders under the rank of nobility ; and were not meant to be comprehended in the class of lesser barons or freeholders, to whom the privilege of electing or being elected commissioners of the shires was given by the act 1587, and subsequent statutes ; for evidence of which they relied on the following transactions in parliament, viz. an entry in the journals of parliament of Scotland, of the 23d April 1685, which is in the following words : “ In respect that Viscount
“ Tarbet’s eldest son, elected one of the commissioners for
“ the shire of Ross, by reason that his father is nobilitated,
“ cannot now represent that shire, warrant was given to the
“ freeholders of that shire to meet and elect another person
“ in his place.” 2. They also founded on an entry in the journals of the meetings of the estates, or convention of parliament 1689, in the following terms : “ Edinburgh, 18th
“ March 1689. The Meeting of Estates having heard the re-
“ port of the committee for elections, bearing that in the con-
“ troverted election for the burgh of Linlithgow in favour of
“ Lord Livingston and Wm. Higgins, it is the opinion of the
“ committee that Wm. Higgins’ commission ought to be pre-
“ ferred ; first, in regard to Lord Livingstone’s incapacity to
“ represent a burgh, being the eldest son of a peer ; secondly,
“ in respect that Wm. Higgins was more regularly and formal-
“ ly elected by the plurality of the votes of the burgesses :
“ They have approven and approve of the said report in both
“ the heads thereof, and interpone their authority thereto.” 3. The following entry in the Journals of the Commons of *Great Britain*. 3 Dec. 1708, made on hearing the matter of several petitions complaining of the election and return of four eldest sons of peers of Scotland, to represent different places in that part of the United Kingdom, in the first parliament after the Union. A motion being made, and the question put, “ That the eldest sons of peers of Scotland
“ were capable, by the laws of Scotland at the time of the

“ Union, to elect or to be elected as commissioners for
 “ shires or burghs to the parliament of Scotland; and there-
 “ fore, by the treaty of Union, are capable to elect or be
 “ elected to represent any shire or burgh in Scotland to sit
 “ in the House of Commons; it passed in the negative.”

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4. The entry in the Journals of 1755, ordering a writ to issue for electing a member for the county of Dumfries, in the room of Lord Chas. Douglas, become the eldest son of the Duke of Queensberry; and a similar entry in 1787, in the case of Lord Elcho. The respondent further maintained, that there was no instance since the passing of the act 1587, of the eldest son of a peer voting, or attempting to vote, in the election of the commons, or being elected, except in Lord Livingstone's case 1689, and in the case in 1708 just mentioned. The conclusion thence was, 1. That the law was against the right of a peer's eldest son enjoying such a privilege. 2. That if they had ever any such right, it was lost by disuse.

The appellant, on the other hand, pleaded the statutes 1587, 1661 and 1681, as bestowing, in express and clear terms, the right of being enrolled and voting at elections for the shires upon the eldest sons of peers in common with all other persons possessed of lands of tenure and extent therein mentioned, *not being Lords of Parliament, or noblemen*. This last term being used as synonymous with Lords of Parliament. He further contended, that if the sons of peers were entitled, and in use to sit in parliament as lesser barons or freeholders *before* the act 1587, it followed that *after* it, they were electors, and eligible to be elected members of parliament, for that act had no other object but to introduce representations in place of personal attendance. In evidence that they were entitled so to sit, and in many instances exercised the right, the appellant produced extracts, or certified copies of the rolls of parliament 1478, 1481, 1488, 1503, 1525, 1526, 1546, 1567, 1568.

The Court pronounced this interlocutor: “ Sustain the
 “ objection to the appellant's claim for enrolment; find the
 “ freeholders did wrong in enrolling him in the roll of free-
 “ holders for the Stewartry of Kirkcudbright, and grant war-
 “ rant to and ordain the Stewart clerk to expunge his name
 “ from the roll.

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The only question in this

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cause (as the appellant apprehends) is, Whether his being the eldest son of a peer of Scotland, was in law a bar to his claim to be enrolled in the roll of freeholders of the Stewart-ry of Kirkcudbright? To this precise question the freeholders and the Court of Session ought to have confined themselves. What may result from his being put on the roll is in the meantime problematical. If elected to serve in the House of Commons, the present is not the time, nor this Court the place, to judge in, and determine such a matter.

The statute 1587 enacts, “ That *all freeholders* of the “ king, *under the degree of prelates and lords of parliament*, “ shall be summoned to attend the election of the commis- “ sioners for the shire, and have voices, provided they are “ possessed of a 40s. land.” The appellant is possessed of a 40s. land held of the king, and he is a person under the degree of prelates and lords of parliament. The act 1661 enacts, that all heritors who hold a 40s. land of the king *in capite*, shall be and are capable to vote in the election of commissioners to parliament, excepting noblemen and their vassals. The appellant is not a nobleman. The third statute 1681, refers to the two former for the description of persons who were to be put upon the roll, these being generally, “ The whole freeholders, having election of commissioners.” Besides, the act 16 Geo. II., under the direction of which the Court of Session acts, does not say a syllable to countenance the idea that a peer’s eldest son is not entitled to be put on the roll ; and there is not one legal authority in the law of Scotland who lays down such a doctrine.

Pleaded for the Respondents.—Although the only question between the parties is, Whether the noble appellant had or had not a right to be admitted to the roll of freeholders? the solution of that question must necessarily depend upon his eligibility to elect or be elected, the right to elect and be elected going hand in hand ; and unless where, by particular statutes, a disqualification in one respect only is imposed. The act 1587 ordered the freeholders to elect freeholders. The act 1661, c. 35, declares that persons of a particular description “ shall be and are “ capable to vote in the election of commissioners of parlia- “ ment, and to be elected commissioners to parliament.” The act 1681 calls the roll of freeholders the roll of elections. Fountainhall, when mentioning an election for the county of Mid-Lothian that took place upon the 12th March 1685, observes, that “ the King’s Advocate and Justice “ Clerk should not have voted in this election because, being

“ officers of state, they were not capable to be elected *sunt* 1793.
“ *correlata quorum uno sublato tollitur et alterum.*” The act
of 12th of Anne, cap. 6, constantly joins together the right to LORD DAER
vote and the right to be elected. The act 16 Geo. II. also v.
provides, in the same manner; so that it would not do to STEWART, &c.
attempt, as is here done, to separate the right to be put on
the roll of freeholders from the right of being elected a
commissioner to parliament. They are identically one and
the same right, and the one necessarily involves the other.
But the constitution of almost every country is the creature
of usage. It is seldom to be found in any written code, and
the principles upon which it in part depends, are often dif-
ficult to be traced in history, and sometimes cannot be at all
discovered. It suffers alterations by degrees, and owing to
a change of manners and of sentiments, as it were imper-
ceptibly; but when moulded by long usage into a *system*,
no innovation, however expedient it may be, can be intro-
duced by courts of law, or in any other manner than by the
general voice of the people, collected and declared in a con-
stitutional manner. It is in vain for those who have had no
seat in the legislative assembly for a long tract of time, to
attempt to claim it on the pretence that they enjoyed it in
a more ancient time, and could not lose by disuse what was
their acknowledged right. Such disuse, in matters of na-
tional concern, becomes contrary usage, which is of itself
sufficient not only to alter the constitution of parliament,
but also to impair the prerogative of the crown. It is, how-
ever, an admitted fact, that for more than two centuries
not one instance can be traced of the eldest son of a Scot-
tish peer representing a county or borough in Scotland,
either in the Scottish or British parliament. Nay, the ap-
pellant has completely failed in bringing proof, notwith-
standing all his research, that such eldest sons *did at any*
period sit in the parliament of Scotland, in virtue of their
possessing lands held of the crown, and of their making *part*
of the freeholders or libere tenentes. But the question does
not rest upon the usage of no sons of peers sitting in parlia-
ment since 1587. There is the evidence of positive acts
done, not only to indicate the law, but also the mind of the
legislature on the subject. Such are the cases of Living-
stone, Tarbet, and others, whose claims to be elected to sit
in the Commons House of parliament were rejected, on the
ground of their being the eldest sons of peers.

After hearing counsel,

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LORD STANHOPE said,

MY LORDS,

"I refer you to the proceedings in parliament of Scotland, which had been founded on by the respondents in the case of the Master of Tarbet in 1685, and of Lord Livingstone in 1689, as well as to the decision of the House of Commons of Great Britain in 1708; the two first of which cases, I maintain, do not apply to the precise case in question; and, at all events, as none of them had been sanctioned by any enactment of the legislature, they could not be considered to constitute law, so as to bind either the Court of Session or your Lordships as a Court of appeal. He had heard it laid down, upon the decision of an appeal from Scotland respecting nominal and fictitious votes, by a noble and learned Lord (Thurlow), to whose judgment and abilities the greatest deference was due, that a train of decisions even in the Court of last appeal, were not binding as precedents, if such decisions appeared palpably erroneous; and in that sentiment, expressed in so guarded a manner, I perfectly concur. In the present instance, the judgment of the Court of Session did not appear to him to be founded on any principle of sound reason; and, unacquainted as he was with legal knowledge, he would not have presumed to deliver his sentiments in this House, on a point of this kind, if the acts of parliament on the subject had not appeared to him so clear as to be obvious to every person." (His Lordship then entered into a detail of the acts of parliament 1727 downwards, and concluded by moving) "That the freeholders had done right in ordering Lord Daer to be enrolled, and that the Court of Session had done wrong in altering their judgment."

LORD THURLOW said, "That were I now considering this question as a legislator, I would most probably agree entirely with the noble Earl who had just sat down, that there is no good reason why the eldest sons of Scotch peers should not be eligible as representatives in the Commons House of Parliament of Great Britain for counties and burghs in Scotland, in the same way that the eldest sons of peers of England are, for English counties and burghs; but nothing could be more dangerous than that their Lordships should allow themselves to act upon any idea of legislation when sitting as judges in a Court of appeal; in which case, it was their duty to place themselves exactly in the situation of the court from whence the appeal comes; and they should not consider what the law ought to be, but what it really is.—When this case came before the Court of Session, they found an uniform practice of more than 200 years, taking its rise in the act of parliament 1587, which established in fact a new constitution in Scotland; by that act, the parliament was made to consist of four distinct branches, "viz.—the Prelates, the Greater Barons or Lords of Parliament, the Commissioners from the lesser Barons, and the Burgesses; and it seems to me clear,

that the eldest sons of peers were exempted from being sent as commissioners to parliament, which was then considered as a burden. In this the matter originated; and, when the being chosen as a commissioner of parliament was considered as a privilege, instead of being a burden, what was formerly an exemption, operated then as a disability." (His Lordship then supported this view by reference to the acts of parliament and constitutional history of Scotland); and said, "That although such would have been his opinion, as an historian or antiquarian, upon the meaning of the act of parliament 1587, and on the law as it stood at that time; yet, had the subsequent practice been different, he would have yielded that opinion; but when, on the contrary, he found it supported by the uniform invariable practice of 200 years, and by the opinion of every writer on the law of Scotland: when he saw the proceedings of the parliament of Scotland in 1685 and 1689; and saw also the decision of the House of Commons in 1708, proceeding upon a full hearing and mature consideration, so recently subsequent to the act 1707, it appeared to him that the consequence would be dreadful indeed to all the rest of the law of Scotland, if their Lordships should allow themselves, upon any fine spun reasoning, to alter such established law." He therefore moved to affirm.

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It was therefore ordered and adjudged that the interlocutor be affirmed.

For Appellant, *Sir J. Scott; Geo. Hardinge, T. Erskine, Fra. Hargrave, Wm. Adam.*

For Respondents, *Alex. Wight, George Ferguson.*

NOTE.—This disability was abolished by the Reform Act, 2 Wm. IV. c. 65, and now the eldest sons of Scotch Peers may represent any county or burgh in Scotland.

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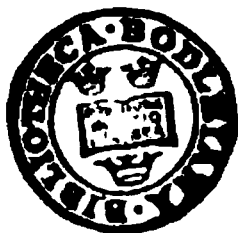
[Mor. p. 2379 and 4617.]

DAVID HAY BALFOUR of Leys, and LUCY } *Appellants;*
 HAY OF MONCRIEFF, &c. - - - }

HENRIETTA SCOTT, LUCY SCOTT, JOANNA } *Respondents.*
 SCOTT, Daughters of JOHN SCOTT, }

House of Lords, 10th April 1793.

EXECUTRY—COLLATION—DOMICILE—FOREIGN.—A party, by birth a Scotsman, having a family estate in Scotland, and possessing a lucrative government appointment there, had, for eleven years before his death, lived in London, and died there intestate, possessing £60,000 of personal estate in England, and a small personal estate in Scotland: Held, his niece, who succeeded by special deed (not of him, but of her grandfather,) to the heritable estate in Scotland, was also entitled to claim her distributive share of the deceased's whole personal estate, without collating the heritable estate to which she had succeeded, insomuch as, she claimed the said share of the personal estate by the law of England, where the deceased had his domicile at the time of his death.



Mr. David Scott of Scotstarvet, on his marriage with Lucy Gordon, had settled his estate to himself and the heirs male of the marriage, whom failing, to his other heirs and assignees whatsoever.

Of this marriage there were issue, 1. David Scott, last of Scotstarvet; 2. John Scott; 3. Elizabeth Scott.

1743.

In 1743 he resigned his estate into the hands of His Majesty, and obtained a charter “to himself in liferent, and to
 “ David Scott, his eldest son, in fee, and the heirs male of
 “ his body, whom failing, to the said John Scott his second
 “ son, and the heirs male of his body, whom all failing, to
 “ his heirs and assignees whatsoever, the eldest heir female,
 “ excluding all other heirs portioners.”

Mr. Scott the elder died in 1767, and was succeeded in his estate of Scotstarvet, worth £1500 per annum, by his son David Scott.

1774.

The son David Scott, now of Scotstarvet, continued to reside on his estate in Fife until the year 1774. In this year he quitted it, and went to reside in London for the remainder of his life, with exception of an occasional visit to Scotland.

1785.

He died in London in 1785 without issue, leaving his estate of Scotstarvet in Scotland, with some personal estate there of inconsiderable value, and £60,000 of personal

estate in England. Before going to London, he had been in possession of his estate in Scotland for six years, and at his death he had been 11 years in London. In the meantime, his brother John, mentioned in the above destination, had died, leaving issue the respondents. His sister Elizabeth was also dead ; but she was represented by the appellants, her children.

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Henrietta Scott, eldest daughter of John Scott, was the heir female entitled to succeed without division to the estate of Scotstarvet, in terms of the destination in the deed of 1743 ; but, besides this, she also took, and had actually recovered her share with the other next of kin, of the personal estate in England and Scotland ; and the question raised by the appellants, in an action of declarator, was, Whether she was entitled, besides the heritable estate, also to take a share of the personal estate without collating ? In defence to the action raised, and in answer to this question, the respondent, Henrietta Scott, maintained that she was entitled to take both ; 1. Because collation was confined to descendants, and did not extend to collaterals ; 2. Because collation only applied to an *ab intestato* succession, and not to the respondent Henrietta Scott, who took the estate of Scotstarvet by special destination under the deed 1743 ; and, 3. It could not apply to the personal estate in England, because collation had no place there ; and the personal estate in England was distributable according to the law of that country, which allowed the heir to take a share of the moveable estate along with the next of kin. 4. That the deceased died domiciled in England : that his personal estate was also there, and, therefore, whether the English estate was to be considered *ratione rei sitae* or *ratione domicilii*, in either event, it was to be regulated in succession, according to the law of England.

The appellants answered, 1. That there was no difference recognised in the law of Scotland, in applying the principles of collation, between direct and collateral succession. That collation applied equally to both lines—the descending as well as the collateral line ; and there was no reason, and no authority in law for making a distinction. 2. That Henrietta Scott, as one of the three heirs portioners of John Scott, was entitled to take up one-third part of that estate as heir at law *ab intestato*. It is only therefore as to the other two-thirds that the legal rule of succession *ab intestato* has been altered

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in her favour by the deed of 1743, declaring, that the eldest heir female shall exclude all other heirs portioners. She is therefore heir *alioque successura*, in which case collation applies, whether she takes by service, as heir whatsoever, or by virtue of special destination. But, separately, although she takes these two-thirds by special destination of her grandfather, yet the whole succession is *ab intestato* as to her uncle. It is a share of her uncle's personal estate she claims, and, by the law of Scotland, she is not entitled to this without collating the heritable estate descending to her by the deed of her grandfather. 3. That the deceased David Scott's estate in England, under all the circumstances, was to be regulated by the law of Scotland; because, in the eye of law, he was domiciled in Scotland. He was by birth a Scotsman; his family estate was there; he enjoyed a lucrative government office there (Director of Chancery); and although, for eleven years previous to his death, he had resided in London, and had died there, there was no reason to suppose that he had left Scotland *animo remanendi*.

Nov. 16, 1787. The Court of Session found that "the defender, Miss Scott, is not entitled to claim any part of the executry of her uncle, David Scott of Scotstarvet in Scotland, without collating her heritable estate, to which she succeeds as heir: Finds the succession to the said David Scott, his personal estate in England, falls to be regulated by the law of England; and therefore, in so far as respects it, assoilzies the defender from the process of declarator, and "decerns." On reclaiming petition, by both appellants and respondents, the Court adhered.

June 17, 1788. "decerns." On reclaiming petition, by both appellants and respondents, the Court adhered.

Against these interlocutors the appellants brought an appeal, in so far as the interlocutor found that the personal estate in England was to be regulated by the law of England, and Henrietta Scott brought a cross appeal, in so far as they found her *not* entitled to a share of the executry in Scotland without collating.

Pleaded for the Appellants.—1. The right to the whole personal estate, as well that in England as in Scotland, ought to be regulated by the law of Scotland. The deceased inherited and possessed a family estate there; held a government office there; was born and brought up there all his life, and, at the time of his death, this family estate and government office were still possessed by him; and though he had been for eleven years previously residing in London

and had died there, yet Scotland was the place of his domicile. It can make no difference in this, that the personal estate was administered to in England, for that was resorted to only to make up a title for recovery, leaving the rights of parties uninjured, and to be regulated by the law of Scotland, where he had his domicile. 2. But even if this personal estate was to be regulated according to the law of England, still, when she comes to claim the heritable estate in Scotland, this can only be done under the usual conditions and obligations imposed by that law, one of which is, that if she takes the heritable estate, she is not entitled to claim the personal; and if she takes the personal, she is bound to collate the heritable, which doctrine of collation being a question applicable to heritable succession, ought to be regulated by the law of Scotland. 3. As to the cross appeal. There can be no doubt as to the executry in Scotland. One cannot take real estate as heir, and also claim a share in the personal estate without collating. And it makes no difference in this, whether those who succeed are collaterals, because collation applies equally to them as to descendants. Nor that she does not succeed *ab intestato*, because, in point of fact, she does take *ab intestato* to the late Mr. Scott her uncle; and it is only to her grandfather that she succeeds by special destination. In either case, she must collate. In the latter, because, besides taking by special destination, she is also *alioque successura*.

Pleaded for the Respondents.—1. It is a settled rule in the law of Scotland that the *lex rei sitae* is the rule which governs succession in personal estate. The personal estate belonging to David Scott consisted of navy bills and government securities, and was situated in England and payable in London, where he had his domicile for many years prior to his death, and where he died. Both the *lex rei sitae* and *lex domicilii* concur in fixing the law of England as the rule of succession, and where, therefore, the Scots law of collation can have no place. 2. It is erroneous to hold the question as one regarding heritable estate in Scotland, to which alone the Scotch law can be applied. Collation is a doctrine not applicable to heritable estate, but alone applies to personal succession. It is not an obligation which burdens the heir's estate; but only a privilege, which he may or may not avail himself just as he chooses. 3. And as to the cross appeal the respondent prefers, she contends that the rule of collation extends only to heirs *ab intestato*, who

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1793. are *alioqui successuri*, not to *haeredes facti*, or of entail, who take *provisione hominis*, or by special deed or will of a predecessor, not *provisione legis*, or by the mere act of law. A man can have but one heir at law, otherwise called heir general, or heir of line; (excepting the case of heirs portioners), but he may have an indefinite number of heirs of entail. But the law of collation is a law of legal succession, and applies only to the heir at law; and all the writers on the law of Scotland seem to lay it clearly down, that it is only the heir at law who succeeds *ab intestato*, that can be obliged to collate. Balfour, p. 233; Stair, b. 3, § 48; M'Kenzie, b. 3, tit. 9, § 11; Bankton, vol. 2, p. 285; in the present case, the respondent does not succeed to any part of Scotstarvet estate as heir *ab intestato* to her uncle; nor was she *alioque successura* to him; because she takes as heir of entail and provision to her grandfather under the settlement 1743, which disinherits both her and her sisters as heirs portioners, and compels her to hold this estate under various restrictions and irritancies. And further, she was not *alioque successura* to the late Scotstarvet, because it was always possible that he could have had children of his own. She is not heir at law but of entail, not *alioque successura* as heir at law, and therefore it is not incumbent on her to collate such estate.

After hearing counsel, it was

Ordered and adjudged that the said original appeal be dismissed this House; and it is hereby further ordered and adjudged that the said interlocutors of the 16th November 1787 and 17th June 1788 complained of by the said Henrietta Scott in the said cross appeal, be, and the same are hereby reversed; and it is hereby declared that the said Henrietta Scott is entitled to claim her distributive share in the whole personal estate of her said uncle, David Scott of Scotstarvet in Scotland, without collating his heritable estate, to which she succeeded as heir, in so much as she claimed the said share of the said personal estate by the law of England, where the said David had his domicile at the time of his death.

For Appellants, *W. Grant, Wm. Tait.*

For Respondents, *R. Dundas, Sir J. Scott, J. Anstruther, John Anstruther, J. A. Park, W. Dundas.*

WM. GILLESPIE and MATTHEW REID,
ADELIZA HUSSEY or BOGLE, and Husband,

Appellants ;
Respondents.

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———
GILLESPIE, &c.
v.
BOGLE, &c.

House of Lords, 3d May 1793.

ADJUDICATION—EXPIRY OF LEGAL—IRREDEEMABLE RIGHT—POSITIVE PRESCRIPTION—A creditor had adjudged, and, upon expiry of the legal of the adjudication, had obtained possession of the lands, which possession continued for more than 40 years, but no charter or infestment had followed on the adjudication ; and upon this the creditor pleaded a prescriptive and irredeemable right : Held, in an action raised by a co-adjudging creditor, that the first adjudging creditor was still bound to account, and that prescriptive possession on adjudication, of which the legal was declared to be expired, did not give an absolute right of property without charter and infestment.

John Wallace, merchant in Glasgow, being indebted to the appellant Reid, by heritable bond, the latter, in consequence of not being able to obtain payment, adjudged the lands over which his heritable security extended. The lands were then on lease to Johnston, at a rent of £11. 13s. 4d., which expired in 1724 ; and further to secure himself, he obtained a reversionary lease to commence in 1724, at the same rent, £11. 13s. 4d.; and by virtue of this lease, and also, as was alleged by the appellants, though denied by the respondents, by virtue of his adjudication, he entered into possession of these lands in 1724. No charter or infestment was taken on the adjudication, but he continued to possess until 1733, when he raised a decree of expiry of the legal of the adjudication, in which decree was obtained, declaring the lands to belong to him *heritably and irredeemably*. The lands remained thus possessed by Reid until 1787, when they were sold to the other appellant, Gillespie, for £800.

1724.

1733.

1787.

Thereafter an action of reduction and declarator was raised by parties who were in right of other adjudging creditors of Wallace, who had led adjudications at the same time, concluding that it should be declared that the debts and sums of money for which the lands were adjudged by Reid, were now extinguished and paid, and that the defenders should account for the intromissions had by themselves and their predecessors, and for the rents of the said lands since the year 1718. In defence, it was stated, that having possessed so long

1793. upon an adjudication, in which decree of expiry of the
 ——— legal was obtained, declaring the lands irredeemable, the
 GILLESPIE, &c. title to the same was absolute, and beyond all question in
 v. the appellant, and they were not now liable to account to
 BOGLE, &c. creditors incumbrancers, or to be disturbed in the same.

The question then resolved into one of abstract law:—
 Whether an adjudication, upon which possession, but no sasine followed, gives, after a decree of expiry of the legal is obtained, an absolute and irredeemable right of property to the creditor, so as completely to cut off the debtor's right to redeem, and also other adjudging creditors' right to call for an accounting?

For the respondents it was maintained, that the statutes, in declaring the property adjudged to belong to the adjudger, after the expiry of the legal, implies the condition that steps will follow for vesting the subjects by charter and infestment following on the adjudication, and this not having been done in this case, their redeemable right was not complete.

For the appellant, it was contended, that the statutes respecting adjudications, do not contain a single expression importing that the right shall not become irredeemable unless followed by charter and sasine. The want of infestment is not made a bar to the right becoming irredeemable. The right to redeem is cut off by the statutes themselves, when ten years have elapsed; and these statutes declare, that the right then is an irredeemable right. Both by prescription, and second, by the legal having expired, and decree obtained of expiry of that legal, the right to the irredeemable property of the land was absolute in the appellants. This the more especially when there is no colourable pretext for saying that the debt had been extinguished by the intromissions with the rent, which never paid the annual interest on the bonds.

June 3, 1790. By several interlocutors the Lord Ordinary, and finally
 Nov. 24, ——— the Court, it was found that the defenders (appellants) were
 Dec. 10, ——— bound to account; and in consequence of several inter-
 Dec. 24, ——— locutors ordering them to give in an account of their in-
 Jan. 28, 1791. ——— tromissions with the rents being disobeyed, they decerned
 Feb. 12, ——— "in terms of the libel."*
 June 28, ———
 July 5, ———
 Dec. 8, ———

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—"Decree of expiry of the legal in absence against the common debtor, without calling the co-adjudgers,

Pleaded for the Appellant.—Originally apprisings were of the nature of a proper sale, without any power of redemption. Latterly, the act 1469, c. 37, declared such apprisings redeemable within 7 years by the owner. The act 1621, c. 6 and 7, extended the legal or equity of redemption in the case of minors only; and the next statute, 1661, c. 62, extended the seven years to 10. Thus the law stood until the act 1672, c. 19, which abolished apprisings, and introduced special and general adjudications; and this act declares, in the case of special adjudications, the lands shall remain heritably and irredeemably with the creditor if not redeemed in five years. In the case of general adjudications in ten. By the whole of these acts, as well as by the statute 1690, c. 10, it was clearly the intention of the legislature to give no redemption after the expiry of the legal, and, consequently, both by their words and spirit, such redemption is now foreclosed, and the lands absolute and irredeemable in the appellants. The whole authorities concur in stating this to be the law laid down by the statutes. The last writer (Ersk. b. 2, § 12, § 22), says, “the right to the lands after elapsing of the legal reversion is carried irredeemably to the ap-

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will have little effect against them. These adjudgers appear to be prior in point of time; and it is upon the personal obligation in an heritable bond that the adjudication is led. There is a *pari passu* preference. It is not an adjudication upon a *debitum fundi*, but upon the personal obligation. No prescription, positive or negative, but decree of expiry for many years elapsed. (Case of Gordon.) On the other hand, the question is with co-adjudgers, and this is a more favourable case for opening the legal, than where the question is with the common debtor alone.

“The adjudication was rigorous when used, as little arrear was then due. No loss of interest:—See Notes on case of Weekes, Session Papers, V. 59. No. 13.—Suppose they were not *pari passu*, but postponed adjudging creditors, the argument would be the same as to the interest of the parties. But if they be *pari passu*, the question is at an end, as the foreclosure cannot operate more in favour of the one than the other. See Erskine, p. 393, and act 1661, c. 62. As to adjudications upon *debita fundi*, see Erskine, p. 326; Stair, New edit.: p. 608, &c. They are much the same with the old apprisings, and legal is only seven years,” Stair, p. 633.

LORD JUSTICE CLERK.—“An adjudication upon a *debitum fundi* is different. This is an adjudication upon the personal obligation in an heritable bond.” Adhere.

Vide President Campbell’s Session Papers, vol. 62.

1793. “ priser, who possesses from that period without account,
 ———— “ not as a creditor in a debt, *but as proprietor of the subject*
 GILLESPIE, &c. “ *apprised.*” The same law is laid down by other writers.
 v.
 BOGLE, &c. Mr. Erskine further says, “ To prevent the legal of apprising
 “ from expiring, and thereby preserve the right of reversion
 “ either to the debtor or *posterior appriser*, it behoves them,
 “ while the legal is yet current, to make premonition or in-
 “ timation to the first appriser, that he may recover his
 “ debt, and to consign the sums due under form of instru-
 “ ment.” So that it is quite obvious from all this, that after
 the legal is expired, the lands are irredeemable—that *within*
 the legal the proprietor, or even his *posterior creditors*,
 might have redeemed. But neither having done this at the
 proper time, it is too late now, after *sixty years possession*,
 to attempt carrying off the property, because it has risen
 very much in value. Nor is it law to hold, that notwith-
 standing the expiry of the legal, the Court, in irritancies of
 this kind, out of considerations of equity, interpose, and al-
 low of an accounting not only to the debtor, but to the
 other creditors, because, where the statutes are positive,
 and no advantage taken, or informality in the adjudication
 itself, no discretion can be exercised in the Court. And the
 doctrine that infestment is necessary to complete the irre-
 deemable nature of the right, goes in direct teeth of the
 statutes. Charter and infestment are only necessary to
 complete the feudal right, but the right, by the expiry of the
 legal, is by the statutes declared to be irredeemable.

Pleaded for the Respondents.—Reid first entered into
 possession of these lands under a lease from Wallace, his
 debtor; and this possession, after the expiry of that lease,
 was only continued as creditor for the purpose of obtaining
 payment of his debt. After that debt was paid, they had
 no longer any right to retain possession, and therefore
 bound to account for the rents received after payment of
 their debt. It is no answer to this to say, that the appellant
 is secured by prescription; and, 2. That the expiry of the
 legal being duly declared, the lands are now irredeemable.
 Because, 1st, The positive prescription cannot apply under
 the act 1617, c. 12, where no infestment exists to which to
 ascribe prescriptive possession; besides, that possession
 commenced as lessee of the lands, and was merely continu-
 ed after the expiry of the lease, at best but as a creditor;
 and, 2d, Before the expiry of the legal makes the right ir-
 redeemable, it is necessary to be infest in order to divest

the debtor. Bankton, vol. ii. p. 222, says, "If the debtor was infest, the adjudication does not denude him without a charter thereon, and an infestment in the adjudger's person." Here no charter of adjudication and infestment followed; and until this took place the right of the appriser was not complete as an irredeemable right. This being the case, and the plea regarding the expiry of the legal being always an equitable consideration disregarded by the Court, in the present case there ought to be less hesitation in so dealing with it, when it is considered the adjudication, as first resorted to, was unnecessary—the creditors being already secured by heritable bond over the subjects, and also, when the appellants are only called on to account by co-adjudging creditors.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and the interlocutors complained of be affirmed, without prejudice to any question which may arise, whether the debt of the respondents, or any and what part of it, had been paid.

For Appellants, *Jas. Boswell, W. Grant.*

For Respondents, *Adam Rolland, Wm. Adam.*

NOTE.—Unreported in Court of Session.

[Bell's Cases, 202 ; More's Stair, Note clxxxvi.]

ROBERT KERR of Chatto, Esq.,	.	<i>Appellant;</i>
WILLIAM REDHEAD,	.	<i>Respondent.</i>

House of Lords, 5th Feb. 1794.

LEASE—POSSESSION—INFORMAL WRITING.—A jotting or agreement was gone into with the tenant while his former lease was not yet expired, for 38 years' lease of the farm after the expiry of the old. The landlord in the meantime died. Held that the heir was not bound by this lease.

The question was, Whether the nature of a tenant's possession of the farm was sufficient to cure the defects of a writing, informal and unstamped, but signed by the landlord and tenant, agreeing to a lease after the expiry of the lease then current; and, whether a succeeding heir was bound to grant a formal lease in terms of the obligation in that writing?

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 —————
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 REDHEAD.

A lease had been granted by the appellant's ancestor, Mrs. Kerr, to Thomas Turner, his heirs and assignees, for 38 years, at a rent of £177, which was afterwards assigned to the respondent Redhead. Mrs. Kerr was then proprietor in fee simple, but afterwards executed an entail limiting the power to grant leases to 19 years. The above lease, which was granted at Whitsunday 1753, expired at Whitsunday 1791, and before the expiry of which, the lease was gone into which raises the present dispute.

The facts of the case appear from the Lord Ordinary's interlocutor. His Lordship first pronounced this interlocutor: " Allows the before mentioned summons of removing
 Dec. 10, 1791. " to be repeated in this process, conjoins the action of removing with the present action; and in the action at the instance of William Redhead against Robert Kerr, Esq., assoilzies Robert Kerr from that action, and decerns; and in the process of removing at the instance of Robert Kerr against William Redhead, decerns conform to the conclusions of the libel."

And, on a representation against this interlocutor, his Lordship pronounced this judgment: " Finds, that on the
 Feb. 10, 1792. " 5th March 1752, Mrs. Kerr, then of Chatto, granted a lease of the lands of Over Chatto to Thomas Turner for 38 years from Whitsunday 1753, for the yearly rent of £177. 15s. 6d. Finds, that on the 17th May 1759, the said Mrs. Kerr executed a strict entail of the said lands and others in the county of Roxburgh belonging to her, whereby, *inter alia*, the heirs of entail were disabled from letting leases for a longer time than 19 years, or for a less tack duty than at the time of the heir's succession; Finds, that about 15 or 16 years ago, the said Mr. Turner granted a sublease of the said farm to the representer (respondent), at the yearly rent of £355. 11s. 1d. Finds, that upon the death of Mrs. Kerr in 1763, she was succeeded by the respondent's father, the institute in the entail, and that upon his death in 1782, the succession opened to Alexander Kerr, his eldest son, who, it is alleged, was then a minor, and soon after went into the army; Finds, that on the 3d March 1788, when the said Alexander Kerr was just come of age, and returned to this country on leave of absence, he entered into what is called a jotting (to be afterwards extended into a tack), of the terms upon which he was to let the said farm to the representer for 19 years as a grazing farm only, to com-

“ mence at the expiry of Mr. Turner’s tack of that farm, of
 “ which there were three years to run ; by which jotting
 “ the rent was to be £345, which is more than £10 less
 “ than the representer was bound to pay by the sublease to
 “ Turner ; and various considerable allowances were to be
 “ made to the representer : Find, that this jotting was sub-
 “ scribed by the parties ; but was null for want of the sta-
 “ tutory solemnities : Find, that the said Alexander having
 “ died abroad, he was succeeded by the respondent, who
 “ alleges that he did not hear of his brother’s death till
 “ March 1791 : Finds, that on 6th August of that year the
 “ respondent wrote to the representer a letter, from which
 “ it appears that the representer had made him an offer for
 “ the farm about two months before, which he had taken
 “ into consideration, but upon inquiry found not to be ade-
 “ quate ; and therefore in said letter desires him to give in
 “ proposals immediately, otherwise he would advertise the
 “ farm : Finds, that the maxim, that an obligation to grant
 “ a tack is equal to a tack, does not hold good against an
 “ heir of entail : Finds, that no actual possession did or
 “ could follow upon the lease granted by Alexander Kerr
 “ to the respondent till Whitsunday 1791, the former lease
 “ not being renounced, and current till that term ; and that
 “ the representer cannot be allowed to ascribe his posses-
 “ sion between the date of the new lease and the expiry of
 “ the old to the former, because the latter was unrenounc-
 “ ed, and current for that period : Finds, that there has
 “ been no possession on the new lease, or homologation
 “ thereof by the respondent (appellant), and decerns.”

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On reclaiming petition to the Court, the Lords altered June 17, 1792.
 and found the tenant entitled to the lease for 19 years un-
 der the writing, and, on petition by the appellant, the Nov. 27, —
 Court adhered.*

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—“ Informal tack granted by heir
 of entail. The case of Campbell of Blythswood very similar. *Res*
non integra. New term actually commenced at Whitsunday 1791, June 19, —
 and no objection made till August. Case of Lord Kinnaird v.
 Hunter, (Mor : p. 15,611.)

“ Petition incompetent. The petitioner has no right to plead in June 27, —
 the name of Turner, who does not appear for himself ; as indeed he
 has no interest. The last interlocutor meant that the 19 years

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Against these two last interlocutors of the Court the present appeal was brought.

Pleaded for the Appellant.—A writing void or improbable in law is no better than none; and the statutory requisites as to writings of this nature, and as to leases, cannot be overcome by any *rei interventus*. What the statutes require as solemnities in this form of the contract, are not suppliable by circumstances extraneous of the form of that contract. No act of the individual, short of making a new instrument, can make good what the statute declares null. A different rule may hold in regard to such contracts as may be binding without writing, and where homologation, or posterior approbatory acts may have an important legal effect; but here, where the law declares the contract null, unless probative according to the statutory solemnities, no such rule can obtain. No doubt, it is laid down by the decisions, that *rei interventus* will validate a contract respecting heritage, though void by the statutes; but then it is laid down to be requisite that something must have happened on the faith of the agreement, which cannot be recalled, and which makes it impossible to put parties in the same situation as before; but here no such circumstances exist. The possession founded on is obviously applicable to the old lease; and the respondent's own conduct towards the appellant, by his offer for a new lease, is itself evidence that he did not consider the writing in question binding. On him, as an heir of entail, it was not binding, because it was granted beyond the 19 years stipulated in the entail, being granted three years before the expiry of the old, it was equal to a lease of 21 years.

Pleaded for the Respondent.—The agreement of 3d March 1786 was a fair and equal bargain, which the appellant does

should be counted from Whitsunday 1788, no matter whether the old lease was renounced or not; but the words conform to agreement never could mean that the old rent should be raised during these three years, contrary to agreement. As to the £200, were there any room for question about it, the parties might still be heard before the Ordinary in consequence of the remit. But the import of the agreement is, that the rent shall be £50 minus for each of the four first years, *i. e.* 1791, 2, 3 and 4.—The wording of the interlocutor was taken from the case of Blythwood. It might have been 16 years from Whitsunday 1791."

President Campbell's Session Papers, vol. 67.

not pretend to dispute. From the moment he got it, he proceeded to cultivate the farm agreeably to the conditions of the new lease. He expended large sums of money on buildings and improvements. He abstained from ploughing and cropping the farm, and laid down in grass what had formerly been in tillage. All these different acts on his part, when rivetted to the alleged defective writing, and when known and acquiesced in by the respondent, create such a *rei interventus* as validates and makes good the contract defective in the solemnities required by law.

After hearing counsel,

LORD THURLOW said :

“ MY LORDS,

“ I yesterday moved for an adjournment in the consideration of this case, that there might be full time to weigh both sides of the argument. I have now paid it a particular attention, and I shall therefore not hesitate to deliver my opinion.

“ The question to be determined is, Whether Redhead the tenant, has in equity, under the circumstances stated in this case, a right to that to which by law he has no right ?

“ When a Court is to decide a question in equity, it is essentially requisite that they proceed upon principles as generally established, and by rules as clear, permanent, and precise, as a court of law would do, did the question depend upon the words of an act of parliament. For if a court shall proceed upon principles peculiar to a particular case, and depart from those broad lines with which every person may be acquainted, it must inevitably happen, that no subject will be able to say by what tenure he holds his estate, or even that his property is secure to him.

“ If this observation will in any case hold good, it is where a court, like the Court of Session, has, by a mixed authority, the power of deciding both in law and in equity. For there, unless the grounds be strongly marked by which their decisions are regulated, law and equity may be so easily confounded, that though the subject be injured, it is impossible for him to discover where the law has failed him. When courts of law are distinct from courts of equity, there is little danger of such a confusion ; because, by the very act of applying to a court of equity, the party virtually admits that the law is against him. Here, therefore, it must with certainty be known upon what principles the judgment is founded. But the case is exceedingly different where law and equity are at the discretion of the same court ; for it is by no means impossible that these

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two may sometimes be so blended together as to make it impossible to discover which of them predominates.

“ To apply this doctrine.—It is equity, that the owner of an estate should have the absolute power over and disposal of that estate—that he should be at liberty to possess it as he pleases during his life, and to settle the succession after his death in what manner he thinks fit. Nay, he may fetter, as it is termed, the succession according even to his *caprice*; for it is the very essence of property, that a man should have an unlimited power to exercise his right of ownership in every respect as most agreeable to himself.

“ I know, that notwithstanding this, it has been determined that, if a tenant for life shall, for a valuable consideration, grant a lease of the estate to endure beyond the period to which he is restricted, still the reverser shall be bound to fulfil the contract, in as far as it can be brought into consonance with the tenure under which the tenant for life held the estate; because the most favourable construction must be put upon a man's intentions, and consequently that it is not to be presumed he intended to do wrong, if his conduct can be otherwise accounted for. To illustrate this,—if a tenant for life, having power to grant a lease for nineteen years, shall grant a lease for twenty-nine, the same rent to be paid during the whole term; and if he shall not live long enough to give effect to his contract, still the reversioner must confirm the lease, upon the original terms, for nineteen years, because the tenant for life undoubtedly intended a lease for that period; while, at the same time, though he might give a lease for twenty-nine years had he lived to execute his intention, he could not mean to do that which he must have known to be absolutely impossible; to wit, to burden his successor for a number of years exceeding the nineteen; and therefore his conduct may thus be brought within the limits of his power.

“ I do not wish to impugn the principles of this decision, though, were the case new, I would not promise to adopt that principle. I wish, however, to show that courts of equity have gone the utmost length which they will be suffered to go, and as far as they will be followed.

“ But it is a case very different from the former, where a tenant for life ventures upon a transaction, clearly at variance, and irreconcilable with those powers under which he holds the estate, and dies before that period when he would be able to give it effect. That I may be understood, suppose a tenant for life, empowered to grant leases for nineteen years, for a valuable consideration, to execute a lease for twenty-nine years, at a high rent for the last ten, but at a low rent for the anterior nineteen years. In such a case, should the tenant for life die within the first ten years, the reversioner, in my opinion, would not be obliged to satisfy his contract; because, in the first place, it was disposing of the estate in a manner irreconcilable

with the declared will of the donor. 2. There was, besides, no controul betwixt the lessee and the reversioner; and, 3. The reversioner, was to be an immediate sufferer by means of the low rent for the first nineteen years, while perhaps he might live to enjoy the advanced rent of the ten last years.

“ This doctrine applies directly to the present case. Your Lordships have an application from an assignee to a lease, praying that, in equity, the appellant, a tenant in tail, might be compelled to execute a contract, which, had Alexander Kerr, the former tenant in tail, lived, he could have been forced to execute, when the contract is in direct and irreconcilable opposition to those restrictions, under which alone the estate could be held.

“ The intention of a Scotch entail is, to prevent the commission of certain acts. If, in the face of such an entail, part of these acts be done, the person transgressing forfeits his title to the estate; in other cases, the doing what is prohibited, only resolves the act itself into a nullity—as for example, where a party dies before his act can receive a legal sanction, agreeably to the deed of entail, as in the case before stated. The whole restrictions laid upon a tenant in tail, must be entered in a record kept for the special purpose; and they must likewise be engrossed in each subsequent investiture of the estate. If, therefore, any one shall contract with such a tenant, for that which he is prevented from performing by the investitures of his estate, the non-performance of such an engagement on the part of the tenant in tail cannot be deemed a hardship, by the party contracting with him, because every person is enabled to know, and therefore ought to know, the extent of those powers to which he is limited.

“ In this case, the agreement with Alexander Kerr, had he outlived the 1791, would have been effectual against him; but as he died before 1791, it will not apply to his successor. For Kerr was authorised to grant leases for 19 years only, not for a longer period. In the year 1788 he executed the contract for 19 years, to commence three years afterwards. That was disposing of the farm for 22 years, and therefore exceeding the term to which he was limited. Had he lived, however, he must have fulfilled his agreement, but as he did not live, it cannot be transferred against a singular successor, which is precisely the character of an heir of entail.

“ But the lease to Turner being current till the year 1791, and Redhead being assignee of that lease, the argument bearing chiefly upon the point is, that the new lease was a prorogation merely of the old one, that it must therefore be considered a lease *de presenti*, and not a lease in reversion. Could this be made out, the question would have a very different appearance; but the proposition cannot be supported. For though, by the law of Scotland, the assignee be what is termed procurator for his own behoof, and irrevocable

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procurator for the assignor ; yet, in the case of a lease, the original tenant is equally bound in payment of the landlord's rent as when himself in possession. It is true that the assignee, by his possession, makes himself also liable to the landlord, and that his property may be distrained, should the rent not be paid. Still, however, that does not liberate the assignor, but only operates to the landlord as a double security.

“ This proves, that notwithstanding an assignment, the interest of the assignor is not extinguished, and therefore, that a new lease to the assignee, to commence at a future period, cannot be termed a prorogation of the old lease, because the parties contractors are different. But independent of this general reasoning, the assignment to the respondent Redhead expressly stipulates, that if the rents and over rents shall be unpaid for two years, the assignor may re-assume possession. Such an event being by no means impossible, Turner, the assignor, must be considered as still tenant of the farm at the date of the agreement betwixt Redhead and Alexander Kerr, the appellant's brother. Hence, it follows that the agreement was not a lease *de presenti*, but at most, a lease in reversion ; not a prorogation of the old lease, but a new lease, to begin when the old lease ended. It was on this account impossible that possession could follow upon the agreement, so as to support the respondent's argument ; unless he had previously surrendered his possession under the old lease, which he no doubt might have done, but which, as a matter of fact, he has not done.

“ This, however, is not all : For the conditions of the agreement differ so essentially from the lease to Turner, that I am satisfied the parties themselves considered this agreement to be altogether a new and separate transaction, perfectly distinct from the old lease ; and that the sole and only object of Redhead was to secure to himself possession of the farm for 19 years after the old lease should be expired. With a view to this, he covenanted that, for the remaining three years of the old lease, he would manage the farm in a manner different from what he might have done, and perhaps less profitably to himself. He has certainly executed his part of the agreement in the most complete, honourable, and ample manner :—For as to the ploughing 40 acres, it is mere *chicanery* to object to this as a deviation ; because the spirit of the agreement was, to convert the grounds into a sheep farm, and ploughing to the extent mentioned, was literally to fulfill that intention in the best manner. But Alexander Kerr, unfortunately for the respondent, died before it was possible for him to perfect his agreement, and the respondent therefore is disappointed. He has come to your Lordships, praying you, for certain reasons, to transfer this obligation upon Alexander Kerr, to the appellant, the present heir of entail, who refuses to ratify it. In this refusal, there is no *mala fides* ; and I do not think that, in equity, the heir of entail can be compelled to ratify it.”

“ I therefore move to reverse :—

“ It was ordered and adjudged that the interlocutors of the Lords of Session of the 19th June, the 10th of July, and 27th of November 1792, complained of be *reversed*. And it is further ordered and adjudged, that the interlocutor of the Lord Ordinary of the 16th of December 1791, and also the interlocutor of the said Lord Ordinary of the 10th of Feb. 1792, in so far as the same affirms the said interlocutor of the 16th Dec. 1791, be affirmed.”

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For Appellant, *Wm. Grant, Geo. Ferguson, Jas. Allan Park.*

For Respondent, *Sir J. Scott, R. Dundas.*

[M. 10971.]

WM. BLACK and ISAAC GRANT, W. S.	<i>Appellants ;</i>
GEORGE GORDON and Others, Creditors on } the Estate of Kinbraigie, .	<i>Respondents.</i>

House of Lords, 5th Feb. 1794.

DECREE OF SALE—ENTAIL—PRESCRIPTION — SUBSTITUTE—MINORITY.—Circumstances in which held that an entail having lain dormant for more than forty years, was prescribed ; and that the minority of a substitute heir of entail did not elide the plea of prescription. Also that the decree of Sale connected with the adjudications led by the creditors against the estate, was a good title to the purchaser thereof.

Alexander Auchyndachy of Kinbraigie was heir of entail, under a deed executed by his grandfather, and also entitled to take up the estate of Kinbraigie as heir of line. He had made up no title to the estate, but possessed on apparency more than forty years. Having contracted debts, adjudications were led at the instance of his creditors, and a process of ranking and sale was brought, in consequence of which, the estate was judicially sold in 1786 to Mr. Byres, the purchaser.

Various attempts were made by Mr. Auchyndachy to overturn this decree of sale ; and in particular a reduction was brought in his own name, and that of his sister Sarah Auchyndachy, as being the next heir of entail, concluding that the decree of sale should be set aside, as contrary to

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 by the pursuers to support this action, judgment was pro-
 nounced, assoilzing the defender Mr. Byres; but, in order
 to test the validity of his title, under the decree of sale, he
 brought a suspension and reduction. Appearance being
 made for the creditors, they pleaded, 1. That the entail
 never having been recorded, was not good against creditors
 who expedite adjudications on the estate; 2. That the en-
 tail was lost, and cut off by prescription, having lain dor-
 mant for more than forty years. Answer to the second plea
 was, the minority of Sarah Auchyndachy was to be deduct-
 ed from the years of prescription. Replied, Sarah Auchyn-
 dachy being only a substitute in the entail, her minority
 could not be deducted.

Jan. 31, 1792. The Court pronounced this interlocutor: “ Find that the
 “ tailzie contained in the late George Auchyndachy’s con-
 “ tract of marriage, is cut off by prescription; and also find
 “ that the decret of sale in favour of Robert Byres, con-
 “ nected with the adjudications which were led prior or
 “ posterior thereto, is a good and valid heritable and irre-
 “ deemable right to the lands of Kincaigie, and others
 “ therein mentioned, purchased by him; and therefore they
 “ refuse the petition, assoilzie the defenders from the whole
 “ conclusions of the reduction.”*

Feb. 17, — On reclaiming petition the Court adhered.
 Against these interlocutors the present appeal was brought.
Pleaded for the Appellants.—1. Though the entail was not

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—“ This is an objection stated to a
 decree of sale, and the question is, Whether a latent entail of the
 estate sold, was worked off by the negative or positive prescription?

“ Auchyndachy’s father was infeft upon a disposition from Duff of
 Hutton in 1728. The entail was made in 1738, and he died in
 1741. The son expedite a general service as heir male and of provi-
 sion upon the disposition of 1728, and afterwards got precept of
 clare from the superior; but no infeftment appears to have been
 taken; Ergo, he remained apparent heir in the feudal investiture of
 1728. He is then charged by creditors to enter heir in special to
 his father, and the lands are adjudged from him. Suppose the cre-
 ditors complete this right by charter of adjudication and infeftment,
 will his intermediate possession be counted to make up the positive
 prescription? Or will the negative prescription operate against the
 latent entail; and further, will the creditors be considered as bound
 by the latent entail, in respect that his right was *personal*, or rather
 incomplete? or will the charge against him, as apparent heir in his

recorded in the record of tailzies, yet as it remained personal, and as the creditors cannot pretend to have relied on the face of the records, so they are not entitled to avail themselves of a provision meant for the security of purchasers, resting upon that security, which the creditors in this case most certainly had not done, since they led their adjudications in the idea that Alexander Auchyndachy was infeft in the lands, which, had they looked at the register, they never could have entertained. 2. The entail is not cut off by the negative prescription. The minority of Sarah Auchindachy completely interrupts it.

Pleaded for the Respondents.—All the diligence by adjudication, &c., which led to the decree of sale having been regular and valid, and the estate itself not being protected against creditors by the entail in question, this entail not having been recorded, the title, under that decree of sale, is unimpeachable. The entail is, besides, prescribed, it having lain dormant for more than forty years. Nor can the heir substitute plead her minority in bar of this prescription, because, according to a long train of decisions, the minority of substitute heirs of entail cannot be deducted.

After hearing counsel, it was ordered and adjudged that the interlocutor be affirmed.

For Appellants, *W. Grant, W. Dundas.*

For Respondents, *Sir J. Scott, Alex. Wight.*

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father's infeftment, be held equivalent to a feudal right in his own person?

“If there be no room for the positive prescription, will the negative prescription operate? Vide case of *Aiton v. Monypenny* in Ante, vol. i. 1756, case of *Porterfield v. Porterfield*, Sess. Papers, vol. xix. No. p. 649.

71. The Court found in these cases, that no document having been taken upon a latent bond of tailzie for more than forty years, the same was cut off by the negative prescription.

“The minority of substitute heirs of entail cannot be allowed as a deduction, otherwise tailzies would never prescribe. The whole heirs are a collective body. The succession opened in 1741, and consequently, *valens agere* from that period.”

LORD JUSTICE CLERK.—“Every personal right is affected by the personal conditions and provisions; but, he is heir apparent under the investiture, which is unlimited. The entail is no bar. Case of *Tailzie of Kilhead—Estate of Cromarties*, about twenty years ago.”

Stewart v. Douglas,
Mor. 15616.

LORD DREGHORN.—“Of same opinion.”

“Court of opinion that the latent entail was cut off by prescription.”

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<p>DUGUID, &c.</p> <p>v.</p> <p>M'LEISH, &c.</p>	<p>JOHN & WM. DUGUID, Merchants in Glasgow, <i>Appellants</i>;</p> <p>ADAM M'LEISH & Co., Merchants in Port- } <i>Respondents.</i> Glasgow,</p>
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House of Lords, 10th Feb. 1794.

SALE—DAMAGES FOR NON-FULFILMENT.—Circumstances in which held, that a bargain for the sale of sugars, was not finally completed, and that the seller, taking advantage of a rise in the price in the market, was at liberty to sell to another party.

The appellant, John Duguid, attended the sample market in Glasgow, for the purpose of buying a quantity of sugars. He saw Mr. Morris there, who had a sample of sugars for sale, which belonged to him and the respondents, Adam M'Leish and Co., amounting in all to 133 casks. The appellant, John Duguid, looked at the sugars, and asked the price, and was told that it was 57s. 6d. per cwt., but thinking the price too high, no offer was made at that time. He also saw, some days thereafter, in the same place, Adam M'Leish endeavouring to sell the same sugars, and they entered into conversation about the sale of the sugars, which ended as before, in the appellant thinking the price too high. Nothing was said about the number of casks, about the weight of them, and the allowance proposed to be made for tare.

Thereafter, and on the 9th of October, the respondents, at Port Glasgow, received from the appellants the following letter:—

Oct. 8, 1790. “ We wish to know if you will allow 14 lb. of extra tare on the 130 casks of Tortola sugars you have to sell.
“ Also please to say the general run of the weights of them,
“ and to say the lowest price you will take for them.” The respondents, of the next day's date, returned the following answer by post:—

Oct. 9, — “ I received yours of yesterday by John Scott.
“ Our lowest price of the 130 casks of Tortola sugars belonging to Mr. Morris and A. M'Leish and Co. is 57s. and 14 lb. extra tare allowed on all casks from 10 to 12 cwt. The 60 hds., P. & W. are all above 12 cwt. but one or two, and some of them above 15. The I. H. are of various weights, from 15 cwt. to 10 cwt.; none of them under that but one, twice 6—2, but it is a light cask. The one

"I. W. are pretty heavy, most about 12 cwt. The E. C. mark is the lightest, none of them reaches 12 cwt."

This letter must have reached Glasgow on the morning of the next day, *Sunday*, October 10. But although the appellants were in the practice of receiving their letters from the post office on Sundays, yet they did not write the respondents by the post of Monday (morning at 8 o'clock) Oct. 11th.

The price of sugars much fluctuating at this time, owing to the unsettled state of matters between Great Britain and Spain. The post from London, which arrived at Glasgow about nine or ten in the morning, brought advice on the 11th of October that sugars had risen 2s. 6d. per cwt. Upon this the appellants sent the following letter *by express* to the respondents:—"We are favoured with yours of Oct. 11, 1790. "this morning, *making us an offer* of your and Mr. Morris' "133 casks of sugar from Tortola, at 57s. per cwt., and to "allow 14 lb. extra tare upon all the casks from 10 to 12 "cwt. As Mr. Morris told us when here that these casks "are lighter than they used to be, we therefore agree to "take these 133 casks sugar at said price of 57s. per cwt., "payable at the usual credit of four months.—When we "want them shipped we will advise you."

This last letter treats the respondents' first letter of the 9th October as *an offer* for the sugars; and the appellants conceived they had only to intimate their acceptance to close the bargain and sale as to these sugars. After dispatching this letter, John Duguid, one of the appellants, proceeded to the public sample room with a view to prevent a sale of the respondents' sugars, (which their agent, Mr. Alexander, had power to sell), under the pretext that they had made a purchase of them. Mr. Alexander, who had that morning been in terms with one Brown, a dealer for the sugars, came to the sale-room by appointment with Brown; and Brown coming into the sale-room almost at the same time, they entered into conversation, but were interrupted by Duguid, who took Alexander aside, and told him that the sugars were his by transaction, and referred to the above correspondence, and the letter of 9th October from the respondents, which he called an offer, and said he had accepted *that offer*, and thus the sugars were his.

Mr. Alexander stated that the letter did not strike him in the same light, but as he did not know how the respondents might have considered it, he would stop the sale of the sugars, and write for instructions. Mr. Alexander accord-

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1794. ingly wrote and explained his negotiations for a sale of the
 DUGUID, &c. sugars with Brown, stating he could have got 59s. per cwt.
 v. for them, and then concludes thus:—"I wish to know if
 M'LEISH, &c. "when you wrote Mr. Duguid, you considered it as making
 Oct. 11, 1790. "him an offer of the sugars, and that you were bound to ac-
 "cept the offer he says he had wrote you of. It will be a
 "pity if he gets them. By advices from London this day,
 "sugars have got up 2s. 6d. per cwt., so that since you were
 "here, they have advanced them 3s. 6d. per cwt."

Before the above letter was received, *that* which the ap-
 pellants had taken care to send by express in the morning
 of the same day, had reached; and the following answer
 immediately returned:—

"Gentlemen, *Port Glasgow*, 11 Oct. 7 o'clock Evng.

"I received yours of this day's date, and agree to let
 "you have Mr. Morris' and A. M'L. & Co.'s 133 casks sugar
 "ex Tortola, at 57s., with an allowance of 14 lb. extra
 "tare on all casks from 10 to 12 cwt.; *but providing that*
 "Mr. Morris or his agent Mr. John Alexander, has not al-
 "ready sold them, and you will apply to Mr. Alexander im-
 "mediately, to know whether or not he has already dispos-
 "ed of these sugars.—I am," &c.

The above letter, it was maintained, proved that there
 was previously no bargain between the parties.

To Mr. Alexander's letter writing for instructions, which
 reached the respondents on the 12th Oct., they wrote for
 answer, that the appellants' letter of the 8th only sought
 for information, and that they had answered it in the usual
 style of giving information; and that if they had stopped
 the sale to Brown it was not fair.

In these circumstances, the respondents sold the sugars to
 another party; and the appellants raised the present action,
 concluding for payment of £1000, "as the amount of loss
 "and damage sustained, or which might be sustained,
 "through failing to fulfil the bargain and disposing of the
 "sugars."

The Lord Ordinary (Dreghorn) pronounced this interlo-
 Feb. 18, 1791. cutor:—"Finds from the correspondence that the sale
 "libelled was a complete bargain; and therefore finds the
 "defenders liable in damages to the pursuers, and allows a
 "condescendence thereof to be given in; but, in respect of
 June 3, 1791. "the circumstances, finds no expenses due." On represen-
 tation, the Lord Ordinary adhered. But, on a reclaiming

petition, the Court altered the interlocutors of the Lord Ordinary, assoilzied the respondents, and decerned; and found the appellants liable in expenses.

Against this interlocutor of the whole Lords the present appeal was brought to the House of Lords.

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 Mar. 2, 1792.

Pleaded for the Appellants.—The respondents have insinuated that the transaction was not fair, and have imputed fraud to the appellants. But, suppose that Mr. Duguid had known that the price of sugars either had risen, or was likely to rise, and had really hurried to conclude a bargain which he foresaw was likely to be a good one, is it possible to maintain that he is guilty of any fraud in so doing? Messrs. Duguid practised no imposition upon M'Leish; they gave him no false information, hung out to him no false lights; if the market rose during the course of the transaction, they had a right to the advantage; a fair prospect of gain is a very proper reason for hastening the conclusion of a bargain which is likely to turn out profitable; and a knowledge of the present or future state of the markets in other places is not only one of the greatest, but one of the fairest and most legitimate sources of mercantile profit. The question then comes to be, Was there, as between the vendor and vendee, a completed bargain in this case? And the appellants contend that M'Leish's letter of the 9th Oct. can be viewed in no other light than as an offer and consent to sell the sugars at the price therein mentioned, provided it was accepted by the appellants. The question asked, What will you take for your sugars? He replies, 57s. Is not this a consent to take that sum, and an offer to sell at it? To argue otherwise, would be to suppose the letters written to gratify idle curiosity merely. If this letter contained an offer, it cannot be denied that Messrs. Duguid's answer contained an acceptance of that offer, and that by it the bargain became complete.

Suppose that the day, or the very hour after Messrs. Duguid had signified their consent to accept of the sugars at 57s. the price had fallen 20 per cent., can it be contended that they would not have been bound to accept the sugars at that price, and to stand to the loss? and if so, are they not equally entitled to the profit? since the only ground upon which they could have been liable to the former is, that the bargain was complete; and if it was so upon the one side, it must have been so upon the other.

Supposing, however, the appellants' letter of the 11th

1794. **DUGUID, &C.** ^{v.} **M'LEISH, &C.** October accepting the offer is not to be looked upon as finishing the transaction, yet it cannot be disputed but that Mr. M'Leish's answer of the 11th is a complete acceptance of the terms of the appellants' letter, with only a proviso that the sugars were still under the power of M'Leish—a proviso which it seems to have been almost unnecessary to add; and as the sugars were not sold prior to the receipt of that letter, it follows, that immediately upon its receipt, they became the property of the appellants. No doubt an attempt is made to show, that but for Mr. Duguid's representations that he had purchased the sugars, they would have been sold to another party, but which sale was prevented by his interference. But the appellants maintain that there was no unfairness, or attempt at imposition in this. Mr. Duguid concealed nothing—misrepresented nothing. He showed Mr. Alexander the letters with M'Leish, and allowed him to judge for himself.

Pleaded for the Respondents.—The true question here is, Whether there was a completed bargain, so as to entitle the appellants to insist in the present action? The appellants' action rests on the principle, that one purchasing goods from another, who does not fulfil his contract by delivery, is entitled to recover what he would have made by the goods had they been delivered, or to reparation for the loss he sustains by the want of them; but it is evident that the purchase, to have such consequence, must have been fairly made. The appellants in effect admitted, that at the time they transmitted their offer of purchasing to the respondents, they knew that the market price of sugars had risen; and the mode of transmitting it evidently shows that they wished to conclude the bargain before the respondents had the same intelligence. They even plumed themselves upon it as a proof of superior intelligence and alertness, and justified it upon the practice of merchants. The respondents do not mean to contend, that it is necessary, in commercial dealings, to communicate or disclose intelligence or motives, nor do they mean to deny that it is allowable to take advantage of prior information or superior sagacity; but in all such cases *certi fines sunt, quos ultra, citraque nequit consistere rectum*. Care must be taken not to go beyond these bounds in the least. That the appellants used improper means to overreach the respondents, is apparent from the correspondence and admitted facts. It was improper, when there was, to their knowledge, an agent at Glasgow appoint-

ed to sell the sugars, to apply in the way that was here done, to the respondents themselves, living at a distance. Had it not been that the agent (Mr. Alexander) had the same intelligence as the appellants, the application would have been to him; and had it not been to outstrip the intelligence which it was foreseen the respondents would receive, from their agent or otherwise, by the post of that day, an *express* would not have been sent. It was still more unjustifiable for the appellants to interfere with the sale of the sugars to Brown at the time when they had no interest in or right to them; and their view in so doing was plainly fraudulent, because they could not fail to be sensible that the respondents' answer would, in any event, be qualified, as it actually turned out to be. The respondents having employed Mr. Alexander to sell, and not knowing but a sale had actually taken place, could not signify their acceptance of the appellants' offer without annexing the condition, *if the goods remained unsold*. But, by the appellants' interference, the respondents were deprived of an advantage they were unquestionably entitled to; and that semblance of a concluded bargain which the appellants found on, was obtained by means so unfair, as effectually to destroy it.

But, in point of fact, there was no concluded bargain. The appellants say that the respondents' letter of the 9th October was an offer of the sugars at the price, and on the terms mentioned in it; and that they having signified their acceptance by the *express* letter of the 11th, the bargain was complete, the sugars were theirs, and they had a right to interfere and to prevent the factor selling to another. But this proposition is preposterous. The respondents' letter of the 9th October was an answer to simple questions, which it is usual for one dealer to ask another:—What price they had fixed on for the goods? what was the weight, or the quantity, &c., and the answer did not go a hairbreadth beyond the questions. How, therefore, they have been able to construe this letter into an offer, surpasses all that the respondents can possibly conceive.

But the appellants, in the second place, maintain that, at any rate, the bargain was concluded by the respondents' (vendors) letter of the 11th October accepting the offer made by them in theirs of the same date. But this necessarily assumes that there could be no completed bargain until the appellants had received the respondents' letter of the 11th October, accepting on condition of Mr. Alexander

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the agent not having sold the goods;—while Mr. Duguid's interference before that date in stopping a sale to Brown, on the pretext that he had purchased the sugars, would, upon this view of the case, appear the more improper and unwarranted. In these circumstances, it will be evident that through the fault of the appellants, the respondents were deprived of an advantage they were entitled to, and would have secured, but for the falsehood and misrepresentation of Mr. Duguid. Their conduct, therefore, must operate to annul the bargain, or rather, so as to make it be held *that there never was a bargain*.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *J. Anstruther, Geo. Ferguson.*

For Respondents, *T. Erskine, W. Grant.*

[Mor. 1620.]

Messrs. PATRICK REID, DAVID KING, and Co., Merchants in New York; JAMES WILSON and Co., Merchants in Kilmar- nock; and JAMES WILSON and Sons, Merchants there,	}	<i>Appellants;</i>
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ARCHIBALD and JOHN COATS, Merchants in Glasgow,	}	<i>Respondents.</i>
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House of Lords, 21st Feb. 1794.

BILL—NEGOTIATION—NEGLECT.—A bill was taken in security of a prior bill, it being at same time agreed that the prior endorsers and acceptors should remain bound. The acceptors of the new bill failed, and the bill in security was never recovered. Thereupon action was raised upon the original bill against the acceptors and endorsers thereof, which had been duly protested. Held, that a bill granted in security is not exempted from the strict rules of negotiation, and this having been neglected by the holders of the new bill, that the acceptors and endorsers of the original bill were not liable in payment.

The respondents, Archibald and John Coats, having furnished goods to James Wilson and Sons, merchants in Kil-

marnock, received from them, in payment of these goods, a bill for £400, payable 12 months after date.

The bill was drawn by James Wilson and Co. upon Reid, King and Co., the appellants, by whom it was accepted. By James Wilson and Co. the bill was endorsed to James Wilson and Sons; and by them it was endorsed to the respondents, and by the respondents to Archibald Grahame, cashier of the Thistle Bank in Glasgow.

When the bill became due, it was protested by the Thistle Bank against the acceptors, drawers, and endorsers, and the respondents having paid the contents of the bill to the bank, became the holders of the bill against the prior endorsers and acceptors.

The respondents having failed to recover payment against the acceptors, Reid, King and Co., and also against the drawers and endorsers in this country, as these companies had partners residing in Antigua; they sent the bill to Ludwell and Scott, merchants in Antigua, with power of attorney, and special instructions to recover the contents.

Ludwell and Scott were unsuccessful in recovering payment of the bill from these parties; but they entered into an arrangement, without any communication with the respondents, with Cumberland Wilson, a partner of James Wilson and Co., and James Wilson and Sons, whereby it was agreed that he should give a bill, by way of additional security, by drawing another bill in favour of the respondents, on Ross and Butler, whom, it was alleged, were debtors to Wilson and Co. This was accordingly done, whereupon Ludwell and Scott granted the following receipt for the bill so received:—"Antigua, Aug. 1, 1785. Received
" from Cumberland Wilson, Esq., partner in the house of
" James Wilson and Co., his draft of this date, on Messrs.
" Ross and Butler, for the sum of four hundred and fifty-
" three pounds, seventeen shillings and five pence sterling,
" and accepted by them payable in this island at 12 months'
" date; which bill is received *as an additional security for*
" *the said protested bill, but, by this express agreement, is in*
" *no respect to exonerate the acceptors, or any of the parties*
" *thereby bound, until actual payment thereof is made.*"

When this bill fell due it was not paid, although repeated letters were sent to Ludwell and Scott, urging them to recover payment. Latterly they could get no answer to their letters; and finally, on 15th January 1789, a letter was received from the agent of Mr. Ludwell, intimating his

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long illness and death, stating that Mr. Scott resided in Liverpool, and that Ross and Butler were bankrupts. Ludwell and Scott, it was alleged and not denied, were closely connected together, both by relation and in business with Ross and Butler; Ross having married Scott's sister, and Butler, Ludwell's cousin, and Ludwell and Scott were, besides, securities for Ross and Butler to their correspondents, Henry Paterson and Company of London, for large cargoes of goods exported by them.

The respondents ordered the original bill of £400 to be returned, and raised the present action against the whole parties on that bill. In defence to this action, it was stated, that the bill delivered over to Ludwell and Scott, attornies for the pursuers (respondents), on Ross and Butler, was a bill which, when paid, was to be applied to the extinction of the debt now sued for. And as at this time, and for years after, Ross and Butler were in good credit: and as they had sufficient funds in their hands to answer the above draft, the respondents, or their attornies, either did, or ought to have recovered payment from them; and as the amount of the draft fully paid the debt due to the pursuers, the defenders fell to be assoilzied from the present process.

The Lord Ordinary, after ordering a condescendence of the facts in support of the libel, pronounced this interlocutor:—“ Having considered the condescendence, &c., and
 June 1, 1791. “ having considered that the pursuers (respondents) did by
 “ their attornies, Ludwell and Scott, demand payment of the
 “ bill in question (the bill pursued on) when due from the de-
 “ fenders (appellants), who were then unable to pay the same;
 “ and that the said attornies did receive from them another
 “ bill on Ross and Butler for the amount, interest, and
 “ charges and commission as an additional security, and un-
 “ der the express declaration that it was in no respect to
 “ exonerate the acceptors or others bound, until actual pay-
 “ ment; and this was so received by the said attornies with-
 “ out any communication with their constituents, and at the
 “ request, and for the accommodation of the defenders: and
 “ having further and separatim considered, what is stated in
 “ the condescendence with regard to the transactions be-
 “ tween Reid, King and Co. and the other defenders the
 “ Wilsons; and that no notice is taken thereof in the answers
 “ nor even in the duplies, although the defenders were called
 “ upon in the replies to speak to it, and it was then averred
 “ that the defenders, the Wilsons, got the sum in the bill to pay

"the pursuers;—repels the defences; finds the defenders
"liable in the sum libelled, and decerns with expenses." 1794.

On representation, the Lord Ordinary adhered. On re-
claiming petition to the whole Lords, the Court refused the
prayer of the petition. And, on second petition, they ad-
hered.*

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Nov. 22, 1791.

Dec. 13, 1791.

Jan. 17, 1792.

Against these interlocutors the present appeal was
brought to the House of Lords.

Pleaded for the Appellants.—It is clear that Ludwell and
Scott were the attornies of the respondents; they describe
themselves as such in the receipt which they gave for the
bill upon Ross and Butler; and it is not denied that they
acted in that character, nor that they, in doing what they
did, exceeded the amount of their commission. Their act-
ings, therefore, must be taken as if they were the acts of
the respondents themselves.

There is a strong legal presumption that the bill upon
Ross and Butler has been paid. The length of time which
elapsed between the time when the bill became payable
and that of giving notice of its being dishonoured, the rela-
tion in which the holders stood to the acceptors Ross and
Butler; the holders themselves, men trained in the habits
of business, and well acquainted with all the forms of it;
these circumstances leave little room to doubt but that the
bill has been paid.

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—"This is a bill transaction. The
bill drawn by Cumberland Wilson on Ross and Butler having only
been deposited with Ludwell and Scott as a further security for the
debt due by Messrs Wilson and Co. and Messrs Coats and Co., it
was incumbent upon Mr Wilson himself, both as drawer of the bill,
and as liable for the principal debt, to have taken care it should be
duly recovered from the acceptor when due. He was more interest-
ed in this than any other person; and Ludwell and Scott acted in
part of the business as his attornies, more than as the attornies of
Messrs Coats and Co. It is enough for these last mentioned gentle-
men to say, we have not got payment from Ross and Butler, and
therefore we must have payment from the original debtors, the
Messrs Wilson and Co. The case is the same as if Messrs Wilson
had given a receipt for payment out of any other fund which had
proved deficient."

17th Jan. 1792, "Bill transaction. No general point of law.
See former notes." (Supra.)

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But supposing the bill not to have been paid, it is established law that the holders of a bill must demand payment of it immediately as it becomes due; and that he must take the earliest opportunity of informing the endorser or drawer, of its dishonour, otherwise he will lose his recourse. In the present case, it does not appear, nor is it even pretended, that any demand was made at the time of the bill's becoming due, nor indeed at any time after; no notice at all was taken for nearly three years, not till the insolvent circumstances of the acceptors Ross and Butler rendered it impossible to take any measures for recovering payment of it from them. The respondents, therefore, by their laches, or which is the same thing, by the laches of their agents, have made the bill their own, and have forfeited all claim upon the appellants. And the wisdom of the law in requiring this diligence in the holder, was perhaps never more manifest than upon the present occasion, since, if the bill had been presented in the regular course, there is no reason to doubt it would have been paid, as Ross and Butler were at the time solvent, and continued so for two years after. From the negligence of Ludwell and Scott, therefore, the appellants have sustained an actual loss.

It is no answer to say, that the bill of Ross and Butler, having only been received as an additional security, any neglect of proper diligence upon it can have no weight; because there is no difference in law between a bill sent as a remittance from one correspondent to another, or given as an additional security for debt. The bill has the same properties, and the same obligations attach upon the holder with respect to it in the latter case as in the former. Where a bill is remitted to another, as in the present instance, as security for one that has been dishonoured, this bill does not cease to be a negotiable instrument, nor is it discharged of the rules required in negotiation; and it makes no difference as to the consequences of neglect of such negotiation, that the party, in giving and taking the new bill, has stipulated that it is not to liberate the parties on the old bill. But even supposing the holders of a bill in security to be in general not liable for any neglect whatever, still there are some circumstances which would render the respondents accountable for the amount of the bill: 1. Ludwell and Scott knew that Cumberland Wilson, in settling with Ross and Butler, took security for the balance remaining due to him and his partners after deduction of the bill which he

had some months before drawn in favour of the respondents, one of them being a party to the transaction ; and they further knew, that after he had settled with Ross and Butler in this manner, he returned to Britain a short time before the bill he had drawn in their favour became due. From all which it is evident that it must have been understood between the parties that Ludwell and Scott, who received the bill, were also to pay attention to the recovery of it, and that it was given them on these terms. 2. Ludwell and Scott were not merely guilty of neglect ; their conduct amounts to positive wrong done to the appellants, they having recovered large sums from Ross and Butler after this bill became due, which they applied wholly to relieve themselves of debts for which they were bound, but which they did not apply (at least so it is now pretended) any part they so received in payment of this bill which was lying in their hands past due. 3. It is to be observed, that the respondents, or their attornies for them, took a sum for commission for receiving the money for Ross and Butler, as appears from the sums added to the bill, a state of which was transmitted to the respondents in August 1785, when the bill was given. This, therefore, independently of every thing else, makes them liable, if not for strict negotiation, at least to some diligence in which they and their attornies have totally failed.

Pleaded for the Respondents.—The bill for £400, upon which the appellants put their names, has never been paid, and neither has the bill granted by Ross and Butler in security of the former bill ; consequently the respondents have not recovered payment of the debt justly due to them for value received from the respondents by the appellants, in consequence of goods furnished in the fair course of trade. This is proved by the fact of both the bills being now in possession of the respondents, who upon receiving payment of the £400 bill with interest and expenses, will deliver up both the original bill and the bill granted in security by Ross and Butler.

The defence pleaded by the appellants against paying the debt, which is in this manner proved to be still owing to the respondents is, that the respondents should have recovered payment of the bill due by Ross and Butler ; and that if they have not done so, they have themselves to blame, and cannot now have recourse against the appellants. The respondents, it is said, should have negotiated the bill a-

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gainst Ross and Butler, in all the forms known in law and practice ; but, instead of doing so, they took no step whatever to recover its contents, but neglected demanding payment till Ross and Butler became bankrupt. They were therefore guilty of a gross neglect, and the damage arising from that neglect they must bear themselves.

When Ludwell and Scott took the bill upon Ross and Butler from Cumberland Wilson, they took it as an additional security for the debt owing by the appellants, and under the *express declaration that it was in no respect to exonerate the acceptors of the original bill, or any of the parties* thereby bound, till actual payment of the bill by Ross and Butler was made. The bill of Ross and Butler, therefore, was not taken in solutum of the debt due by the appellants, but merely in security of that debt.

In point of law there is nothing more clearly fixed in the law of Scotland than this, that where a bill is granted in security, it does not require to be duly negotiated like other bills, in order to preserve the right of the person who holds it to insist for the original debt, in security of which the bill was granted ; if the bill given in security is paid, the debt is of course extinguished to the amount of that payment ; but if the bill given in security is not paid, the debt remains still due, and it does so though the holder of the bill in security has taken no step whatever to operate payment. This has been found by repeated decisions :—In particular, it was decided to be the law in the case of *Alexander v. Cumming*, 3d Jan. 1758 ; in which case it was found that where a bill is granted not in solutum of a debt, but only in security, the endorser was still liable on the original ground of debt, though the holder of the bill had taken no step whatever to recover payment of the bill given him in security. The same doctrine was held to be law in the still later cases of *M'Kinnon v. Garroch*, 1st Feb. 1775 ; *Glass v. Kellie*, 26th Nov. 1776 ; *Pringle v. Keltie*, 11th Feb. 1777 ; and *M'Ausland v. Hamilton and Co.* 27th Nov. 1779.

Had the bill of Ross and Butler been taken in solutum of the debt owing by the appellants, the case would have been different. But a *novatio debiti* is never to be presumed ; and in this case there is no room for presumption, as the fact, that the bill upon Ross and Butler was taken merely as an additional security for the bill in which the appellants were bound, is proved not only by the terms of the receipt

granted by Ludwell and Scott to Cumberland Wilson, but by this circumstance of real evidence, that both the original bill, and the bill drawn upon Ross and Butler, remained in the possession of Ludwell and Scott. Whether Ludwell and Scott took any steps to recover payment of this bill (original bill) the respondents cannot tell; but it is certain that from the moment that Ludwell and Scott took the bill in security, which they did without any authority from the respondents, repeated letters were written by the respondents, during the course of two years, urging Ludwell and Scott to recover payment of the bill from Ross and Butler, and urging them to procure payment of the debt in question. Whether Ludwell and Scott took any steps to that purpose, it is immaterial to inquire, because it was not incumbent upon the respondents to make a single demand upon Ross and Butler to pay the bill which they had granted; for it is clearly contrary to law, to say that if a creditor does not pursue a cautioner or surety for a debt, he is not to be allowed to make a demand upon the principal obligant: That a creditor cannot distress a surety without discussing the principal is established law; but to reverse the rule, and to say that a creditor must discuss the cautioner, or lose his claim against the principal obligant, is a doctrine that was never heard of before. As Ross and Butler were merely sureties for the appellants, it is impossible to conceive upon what ground the fact of the respondents not having prosecuted the sureties while they were solvent ought to have the effect of liberating the appellants. On these grounds, and in particular also of the precise terms of the receipt, which expressly stipulated that the acceptors and endorsers of the old bill were to remain bound, the interlocutor of the Court of Session ought to be affirmed.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be reversed, and that the defenders (appellants) be assoilzied.

For Appellants, *J. Anstruther, Wm. Adam.*

For Respondents, *W. Grant, Ar. Campbell, Wm. Tait.*

NOTE.—It is stated in Morison (1620) that this case was reversed on the same principles as those decided in *Sir J. Murray v. Grosset*, 16th Feb. 1762, House of Lords, 17th March 1763; ante vol. ii. p. 81; namely, that a bill given in security was not exempted from the strict rules of negotiation. Vide also Professor Bell's Com. vol. i. p. 425.

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<hr style="width: 100px; margin: 0;"/> ADDISON, &c. v. ROW.	ADDISON & Sons, Owners of the Whaler Ship Caledonia of Borrowstonness, -	}	<i>Appellants :</i>
	Wm. Row of Newcastle, Owner of the Whaler Ship Priscilla, - - -	}	<i>Respondent.</i>

House of Lords, 3d March 1794.

PROPERTY—FIRST POSSESSOR—RULE IN WHALE FISHING.—Held it to be a settled point, that a whale being struck, and afterwards getting loose, is the property of the first striker who continues fast until she is killed ; and that, from the evidence in this case, it appeared that the whale, when struck with the harpoon of the appellants' ship, had got free from the harpoon of the respondent's, and therefore that the whale belonged to the appellants.

This was a dispute about the property of a whale between the owners of the whaling ship Caledonia, and the owners of the Priscilla, both engaged in the whale fishery at Davies Straits.

Wm. Row's ship Priscilla, commanded by Captain Frank, was the first striker, and brought action before the Admiralty Court in Scotland against Addison and Sons, the owners of the Caledonia, who were the takers of the fish. The Judge Admiral, after a proof, sustained the defences founded on the fish being a loose fish at the time the Caledonia's boats came up and struck her with the second harpoon. But of this sentence the respondent brought a reduction and declarator, setting forth the following facts : That both vessels being engaged in the whale fishing, the Caledonia's boats harpooned and got fast to a fish on the 27th May 1789, near to where the Priscilla then lay, whereupon Frank, the captain of the latter, ordered out his boats manned to assist the Caledonia in killing the fish. Accordingly, when the whale came up to blow, after being struck, it was harpooned a second time by the Priscilla's boats, by which means the fish was killed, and became the property of the Caledonia, the first striker. The captain of the Caledonia, in return for the gratuitous assistance so rendered, promised the captain of the Priscilla that when he got fast to a fish, he would render the same assistance in return during the season.

Accordingly, two days after this (29th May) the Priscilla's boats struck a whale, which immediately took down, and,

on hoisting his signal to the other boats and vessels of his being fast, the defender, James Pottinger, captain of the Caledonia, lowered, manned, and ordered out four boats to assist the Priscilla in killing the fish: That while the boats were on the watch for the rising of the fish, she came up to the surface, after being three quarters of an hour down, at a great distance, and in a different direction from what was expected, and nearer to the Caledonia than any of the boats, with the Priscilla's harpoon sticking in her back, blowing very hard and thick as a wounded fish, and lay on the water sometime, whereupon two other boats were let down, manned, and ordered out from the Caledonia, in one of which William Robertson, mate, acted as harpooner, who rowed up to the fish, and struck a harpoon into her, after which she again took down, at which time the line of the Priscilla's boat seemed fast, as the boat's crew continued to let it out, when, in a few minutes thereafter, it appeared loose, and came home: That when the fish again came to the surface, she was struck with a third harpoon from the Priscilla's boat, and from a boat belonging to the ship Kitty, and was killed; yet notwithstanding this, and in breach of his promise of assistance, and on pretence that the fish was a loose fish at the time the Caledonia's boats struck her, the whale was taken possession of and cut up by the captain of the Caledonia, against the remonstrances and prior claim of the Priscilla: That the line attached to the Priscilla's harpoon struck first into the fish had the appearance of being cut cross-over with a sharp instrument near the splice, and almost close to the hose for the shaft used at striking the harpoon into the fish; that this must have been done by Robertson with the intention of defeating the Priscilla's right of first striker. In defence, the appellants admitted the facts as to the promise of assistance, but stated that this only extended to a fast fish, but positively denied that when the Caledonia's boats came up that the fish was fast: On the contrary, finding that the fish had got loose, he harpooned it on his own account, in virtue of the practice and law prevailing in all such fisheries. That the fact of the fish being a loose fish was supported by many presumptions; 1. From the unexpected turn the whale took; 2. From the great distance to which it ran from the Priscilla's boats, nearly ten lines, whereas the Priscilla's rope was no longer than five lines in length; and offered to prove that she was a loose fish at that time.

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1794. A proof was ordered to both parties. which was conflicting in its nature ; the crew of the Caledonia's boats deposing that the fish was loose, and detached from the harpoon, although the harpoon still remained fast in its body : That at this time the whale was ten lines from the Priscilla's boat which had first harpooned it : That immediately thereafter the fish went down, dragging their line along with it. They also proved, by a great many witnesses experienced and employed in whale fishing, the practice in the Greenland and Davies Straits fisheries to be, that when an assisting ship finds the whale loose, if he strikes and follows up the chase until he kill her, the fish belongs to him ; but, if the harpoon of the ship who struck the whale first be found in her after she is loose, and they can prove that the line was cut by the harpoon of the second ship who strikes into her, the fish will belong to the ship which first struck ; but, if they cannot prove that the harpoon of the second ship cut the line, then the fish belongs to the second or assisting ship : and, finally, that the whale commonly belongs to the first striker whose boat or line continues fast until the fish is killed. That the line may be cut, and sometimes is cut, by running through foul ground, by rubbing on the ice, or being cut against a rock. On the other hand, the (pursuer) respondent, besides objecting to the credibility of the appellants' evidence, consisting chiefly of Robertson, the harpooner, and his boat's crew, (Robertson was charged with being guilty, in a former case, of cutting the line, where, in consequence, the fish was divided between the two vessels), he proved, 1. That the whale was fast to the Priscilla's boat at the time she was struck a second time by Robertson—that after being struck by Robertson she ran out line from the Priscilla's boat to the extent of 30 or 40 fathoms, a fact inconsistent with the supposition of her being a loose fish when Robertson so struck. 2. That the foreganger of the Priscilla's harpoon, which was afterwards discovered to be loose, had the appearance of being cut by a sharp instrument close by the splice, instead of being broken accidentally. 3. That Robertson had been guilty before of cutting out the harpoons and lines, in order to found such claims. 4. The promise to assist, and that on this occasion they were only performing that promise, and not with the view of interfering as they afterwards did with their wounded fish, ought to silence their claim. One of their own wit-

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nesses belonging to the first four boats, deposed that they were ordered to go and assist in killing the fish.

The general argument of the appellant was, that by the general principles of law, actual apprehension was necessary to secure the property of animals, *ferae naturae*; and consequently, the moment the Priscilla's harpoon got loose, the fish became the property of the first that should afterwards strike.

The respondent maintained that this did not follow, if the fish has been already harpooned, and still in pursuit: That some weight and effect were due to the first harpoon, and some right to the first wounder: That if the wound is such as must force the fish to seek the shore, or, as in this case, the harpoon remains fast in the fish, she belongs to the first wounder: That this is the modern rule of acquiring property in *ferae naturae*: And though in an early state of society the occupancy or actual apprehension and detention of a wild animal, might appear necessary to constitute a claim of property, yet when the idea of property came to be better understood, a slighter connection was deemed sufficient, and property was more considered an act of the mind: That though a difference subsisted among the Roman lawyers upon the question: Whether the wounding of a wild animal did not create a latent property so long as the pursuit was continued? Yet it seemed to be agreed by later authors, that it was unlawful for any person to interfere with another in the pursuit of the animal that had been once wounded, especially where the wounding was attended with the apprehension of the animal by getting fast to it, though afterwards got loose, and a wound which would necessarily lead to its capture: That at all events the Caledonia's crew were barred from claiming the fish in consequence of their promise of assistance, even supposing the Priscilla's foreganger had been accidentally broken previous to her being struck by Robertson.

The Lord Ordinary, of this date, found, " That under all the circumstances of this case, the whale libelled must, in justice, be considered to have been the property of the owners of the ship Priscilla; and, in respect thereof, sustains the reasons of reduction; and finds that the defenders must account to the pursuers for the full value of the said whale: but in respect that the parties have not hitherto been heard upon the amount thereof, remit to enquire into this."

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L. 41, Tit. 1,
§ 5, De acq.
rer. Dom.

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 ———
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 Nov. 27, 1792.

On reclaiming petition the Court adhered.*

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—Upon all the principles of law which govern such cases, and upon the usage and custom of the fishery in Greenland and Davies Straits, the property of the whale is the appellants, the owners of the Caledonia. Because, 1. Although the Priscilla's boat and crew first struck the fish, and she immediately went down, and was below three quarters of an hour, taking an unexpected turn or direction, and rose at a great distance from the boat that struck her; yet, as it was equally well proved, when she again rose to the surface, nearer to the Caledonia than any of the other boats, the foreganger of the Priscilla's harpoon was broken, and the fish a loose fish, whereupon the Caledonia's crew having struck into her, and continued fast until she was killed, the fish by law, and by the established custom and usage of the fishery, was the property of the Caledonia. Because, 2. This being the rule as to a fish struck with the harpoon from whose line she has got loose, the whole doctrine as to the first wounder of the fish having a right of property in it goes for nothing; because, 3. It is proved that the line which the Priscilla had on board of her striking boat was only four lines and a half, while it has been proved, that when she rose, after being under water, she was more than ten lines from the boat, which at once proves that the fish was a loose fish, and that the line had been cut by the ice or the rocks, which is further confirmed by the difficulty in hauling in the lines, it having taken the

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—“ This is a question about the property of a whale. In my opinion the interlocutor is right. The general rule is, that game belongs to the first occupant, being naturally *res nullius*. But if I once seize upon the animal, and it breaks away from me, and I still continue in pursuit, I do not thereby lose my right as first occupant, so long as there are hopes of recovering it. See title in Pandects, “ De Acquirendo Rerum Dominio, Lib. xli. tit. 1. There is no custom proved which can derogate from this general principle. The specialities are in favour of the pursuers. The boats of the Priscilla would have taken the whale if the Caledonia had never interfered. Robertson's testimony is contradicted in some particulars by the defender's own witnesses.”

President Campbell's Session Papers, vol. 67.

crews of five boats to do so, from being entangled with the ice or rocks at the bottom ; because, 4. There is positive evidence that the foreganger was seen broken before the Caledonia's boat came up, so that the fish could not be fast, as is alleged, at the time its crew struck into her ; and because, 5. As to the promise of assistance, that was amply redeemed, by its being admitted by the Caledonia's crew that his first four boats were sent out immediately upon observing a signal of a fast fish from the Priscilla's boat, to render assistance in killing her ; but the fish having rose very near the Caledonia, and it appearing a loose fish, he manned two more boats, and harpooned her as a loose fish : That his promise of assistance ceased the moment he saw the fish loose, as upon that event a new right arose to him, and as his promise never extended beyond assistance in killing a fast fish, and not to finding fish for the respondent, the fish was the property of the appellant.

Pleaded for the Respondent.—The appellants have failed in proving that when the Caledonia's boat came up the whale was a loose fish before she was struck by Robertson, their harpooner, a second time ; but as, on the contrary, there is the strongest possible reason to believe that the foreganger of the Priscilla's harpoon was cut designedly by the Caledonia's crew, the whale was the property of the Priscilla. Even supposing the foreganger to have been broken by accident, and the fish a loose fish, yet as it is clearly proved the fish was so wounded and disabled that she might have been killed by the Priscilla's crew without any aid whatever ; and as the Priscilla's crew were in pursuit, it was contrary to the principles of law, and the practice of the fishing, for the crew of the Caledonia to interfere, except for rendering assistance. That the promise in particular bound them to this course, and the assistance being rendered after the fish was struck by the first harpoon, they were barred by their covenant from taking advantage, even if the fish was loose when Robertson came up.

After hearing counsel,

“ LORD THURLOW :

“ MY LORDS,

“ It is a settled point, that a whale being struck, and afterwards getting loose, is the property of the next striker who continues fast till she is killed ; and the special circumstances relied on by the respondent, could not vary the general rule. This was a mere ques-

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1794. **CAMPBELL, &c.** v. **RUSSELL, &c.** tion of fact, Whether the whale in question was loose or had got free from the harpoon of the respondent's ship when struck by the appellants? Having gone carefully over the whole evidence, I am quite free to say, that the evidence of the fish being loose at that time preponderated over that given on the part of the respondent; and therefore I move to reverse the judgment of the Court of Session, and affirm that of the Judge Admiral."

The LORD CHANCELLOR concurred with Lord Thurlow in this judgment.

It was ordered and adjudged that the interlocutors be reversed; and that the reasons of reduction of the sentence of the Judge Admiral be repelled.

For Appellants, *F. Erskine, W. Grant.*

For Respondent, *Sir J. Scott, J. Anstruther.*

NOTE.—This appears to be the case noticed by Professor Bell, and in Ivory's Erskine (note), under the name of Rose, 24th Nov. 1792. Vide Ersk. b. ii. tit. 1, § 11, note. Bell's Pr. § 1289, and Illus. vol. i. p. 374.

JOHN CAMPBELL and Another, Underwriters, *Appellants*;
FRANCIS RUSSELL and Co., Saltcoats, *Respondents.*

House of Lords, 4th March 1794.

INSURANCE—CONCEALMENT—DEVIATION. — Held, where a vessel was insured on her voyage home from a foreign port, that the concealment of two letters of advice, which represented the vessel to be unseaworthy, and weakly manned, and that she had been boarded in a sinking state, were facts material to the risk, and not having been communicated, the policy was voided. Also, that the delay of the vessel at Elsinore and Stromness amounted to deviation.

The brigantine Russel, belonging to the respondents, being then at Stockholm, and loading iron there for Dublin, the captain wrote home of his being clear and ready for sea; and in another letter to the same effect, without making any allusion to insurance. After proceeding to sea, the vessel encountered a storm, and put into Airtholm, near Elsinour, in a

sinking state. She had been seen at sea by captain Slater bound for Elsineur, who, on arriving there, reported her, upon which Mr. Scott wrote a letter to the respondents, stating, that captain Slater, on boarding, found the vessel sinking, the crew exhausted with fatigue, working at the pumps, and that she was weakly manned, two of her men having left her at Stockholm. This letter, together with two others from the captain, were concealed from the underwriters, to whom the respondents applied to effect an insurance on the vessel for £700. Two of the letters from the captain merely referred to the sinking state of the vessel—to his narrow escape, and to his making preparation to repair her, and again proceed to sea. He advised insurance, if it could be got, but seemed to doubt it. His last letter, dated 30th September, from Airtholm, stated that she would be clear for sea in fourteen days, and again advised insurance. The following was the respondents' order for insurance :

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“ Saltcoats, 26th Sept. 1789.

“ Mr. Hugh Brown,

“ Sir,—When at Greenock, you will please get £700 sterling insured on the brigantine Russel, captain Kirkwood, valuing the vessel at £800; the vessel having sprung a leak in a gale of wind, has put in there to get the leak stopped, and is to heave the vessel down, having discharged his cargo by his letters to us, dated 30th ult., and expects to be clear for sea in fourteen days. We expect you'll get her insured at the common premium, at and from Airtholm to Dublin.—We are,

“ Francis Russell & Co.”

The vessel was insured accordingly. In the course of the voyage she put into Elsineur, to get more men and provisions. She left that, and put into Stromness, from which advices were received; but on her voyage from thence to Dublin she was lost on 7th September.

Action being raised for the sum in the policy before the Judge Admiral; and decree being obtained therein on the 9th July and 13th September 1790, this decree was brought under the review of the Court of Session by suspension.

In the letters alluded to from the captain were the following passages: 23d Sept. “ I determine to leave 20 tons of iron behind us at Elsineur, for fear of being wintered on the coast of Norway, which will attend to a great expense.

1794. "If you could cover the vessel from Stockholm would be
 ——— "better." 24th Sept. he writes, "But I hope you have in-
 CAMPBELL, & C. "shurred her. If not, I hop you'll endeavour to do so."—
 v. "I think there is no risk of getting the vessel enshurred, as
 RUSSELL, & C. "you have advice from Stockholm, but that I leave to your
 "judgment." 30th Sept. "I wrote you on our arrival here,
 "and likewise 3 letters from Stockholm, which I hop you
 "have enshurred the vessel from Stockholm."

From these expressions the appellants contended that it was Kirkwood's intention to make a fraudulent insurance, and their concealment, therefore, was material—that had they known that the captain was so devoid of honest principles as to insure a vessel after a loss had been sustained, they would not have underwritten the policy, and this fact being material to the risk, and being concealed from them, voided the policy. The intention too, of leaving part of her cargo behind, proved beyond doubt that the vessel was either overloaded, or so disabled as to be unfit to bring it home. That the leaving it there would occasion a delay of the vessel, and every delay of the vessel proceeding on her voyage, occasions additional risk. She was to be ready for sea in 14 days, according to the last advice, whereas she was not clear for sea for 10 days longer;—another cause of delay stated in the letter of 30th was, that she "was in danger of being stopped till the expense of repairs were paid up." And yet the letter containing all these facts, material to the risk, was concealed. 2. But Mr. Brown's letter, written by Mr. Scott for him from Elsinour, apprising of captain Slater having made up with the Russel at sea, and of having boarded her in a sinking state, and also that part which acquainted him with the fact of her being weakly manned, two of her crew having left her at Stockholm, were suppressed. Before she sailed from Airtholm on the voyage insured, another of her men fell sick, and she proceeded from that place, and on the voyage insured, with only one man to supply the place of these three; and, 3. That there was deviation from her voyage. That instead of having proceeded direct to Dublin, she put into Elsinour, and for the purpose of procuring additional seamen to navigate the vessel, and other necessaries, and remained there 36 hours. Therefore, on three grounds, 1st. On concealment; 2d. Of the vessel being improperly manned and unseaworthy; and, 3d. Deviation,—the policy was void.

Dec. 15, 1790. The Lord Ordinary (Lord Justice Clerk), of this date,

suspended the letters simpliciter; and, on representations against this interlocutor, his Lordship adhered: Of these dates respectively. But, on reclaiming petition to the Court, these interlocutors were altered, and the suspenders found “liable in payment to the pursuers of the sums annexed to their respective names in the policy of insurance founded on, with interest.”* 1794.
CAMPBELL, &c.
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RUSSELL, &c.
Dec. 24, 1790.
Mar. 11, 1791.
May 17, 1792.

And, on reclaiming petition, the Lords adhered.

June 5, 1792.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—Fair dealing and representation, and full disclosure of every circumstance material to the risk, are inseparable and essential conditions of the contract of insurance. The underwriters therefore ought to be made acquainted with every circumstance known to the party proposing the insurance, so as to enable them to judge fairly of the proposal, and to say whether they will insure or not: Instead of this, the letter or order of insurance above quoted, was all the information, and every other circumstance was concealed. 1. The letters of the captain; 2. The letter of Mr. Scott; 3. The fraudulent designs of the shipmaster, *who was likewise a part owner of the vessel*; 4. The vessel being weakly manned; 5. Overloaded, or disabled from taking her cargo; and, 6. Delay on proceeding on her voyage, so as to increase the risk. That when she sailed from Airtholm on the voyage insured, she was defective in crew, and in want of necessaries, contrary to the implied warranty in all such contracts. These facts are proved beyond doubt. And that, instead of proceeding direct on her voyage, she deviated therefrom, and went into Elsinour. That, besides this being a deviation, it established also that she had proceeded on the voyage without being properly manned or provisioned, because the captain went in there for the purpose of getting more men and necessaries for the voyage. These circumstances are sufficient to void the policy.

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—“ 1. No material concealment. The insurance was *de facto* made in a proper manner from Airtholm. Mere intention to do wrong not sufficient even if the insured themselves had so intended. 2. Clear evidence that she was sufficiently manned upon the voyage insured. 3. The circumstances of the alleged deviation not explained. Stromness is in the direct course.”

President Campbell's Session Papers, No. 65.

1794. *Pleaded for the Respondents.*—The whole circumstances embraced in the letters upon which the appellants found their charge of concealment refer evidently not to the voyage insured, but to the state of the vessel on her passage from Stockholm to Airtholm. The leakage, and the loss of two of her crew, referred to this part of the voyage; but it is not thence to be inferred that these facts were material circumstances to the voyage to be insured from Airtholm to Dublin. On the contrary, it was to be presumed, that when repaired, she would proceed on her voyage, with the proper complement of men from that place; but, supposing the facts in these letters were really material to the risk, and therefore believed to be known by the underwriters; then it is incontestible that all the facts in these letters necessary to be disclosed, were communicated in the order for insurance. In that order, they refer to the captain's last letter, 30th Sept., the leakage, the discharge of the cargo for repairs, and that she could be ready for sea in fourteen days. The part of the letter not disclosed, namely, leaving part of her cargo, was a circumstance favourable for the underwriters, and not material for the risk. And again, as to her not being sufficiently manned when she sailed from Airtholm to Elsinour, it is proved beyond doubt that she had eight able seamen on board, and from Elsinour, to the place where she was wrecked, she had nine, which was more than sufficient for a ship of her burden. What has been called a deviation from the voyage by calling at Elsinour, was no more than a necessary and indispensable duty, namely, to pay the duties. It was quite involuntary on his part, and by it the ship was not detained thirty-six hours on her voyage.

After hearing Counsel,

LORD THURLOW said:

“MY LORDS,

“With respect to the concealment, it appears to me that the letters in the possession of the respondents, stated the leak to be a much more serious damage to the vessel than the order for insurance had communicated. From these letters, there could be no doubt that the vessel was overloaded, and insufficiently manned, all which, were material circumstances in the risk, and ought to have been communicated to the underwriters. I also think the delay at Elsinour and at Stromness, amounted to a deviation. Therefore, I move that the interlocutor of the Court of Session be reversed, and that of the Lord Ordinary affirmed.”

It was ordered and adjudged that the interlocutor complained of be *reversed*. And it is further ordered that the interlocutors of Lord Justice Clerk, Ordinary there, of the 15th and 24th Dec. 1790, and 11th March 1791 be affirmed.

For Appellants, *Wm. Adam, John Clerk.*

For Respondents, *W. Grant, Wm. Tait.*

NOTE.—Unreported in Court of Session.

[M. 1158 et 1236.]

Messrs. NEWNHAM, EVERETT & Co., . . . *Appellants* ;

DAVID STUART, Esq., Trustee on James Stein's Estate, } *Respondents.*

House of Lords, 25th March 1791.*

House of Lords, 10th March, 1794.

HERITABLE SECURITY—ACT 1696, c. 5—INDEFINITE SECURITY.—

In the *first* appeal in this cause : Held, that an heritable security, granted for future advances, was of no force for sums advanced subsequent to the date of the infestment. This security for a cash credit, consisted of an assignation and conveyance to a former heritable security for the sum of £12,000, but the estate vested by that security was assigned indefinitely, without any mention being made of the extent of the cash credit, in security of which it was so conveyed : Held in the *second* appeal, that the security was of no force or effect even for the advances made before the infestment, in consequence of its being a security for an indefinite amount.

James Stein stood infest in an annual rent of £600, leviable out of the lands of Kincaple, and on that estate itself, for security of a principal sum of £12,000, due by virtue of an heritable bond, granted by Robert Stein of Kincaple.

James Stein being concerned in the firm of Buchanan and Co., merchants in Kincardine, applied to the appellants, bankers in London, for a credit to the extent of £12,000. This was agreed to, on condition of obtaining a conveyance of the Kincaple security, which was done accordingly. But, in the conveyance, there was no definite sum mentioned, for

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* The first appeal in this cause, is reported here, along with the appeal which followed, after coming back from the House of Lords.

1794. which the security was so conveyed, but it stated that it had
 ——— been agreed, on granting the same, that the company in
 NEWNHAM, & CO. which Mr. Stein was concerned, should have a credit, or
 v. account current, to be kept in the appellants' bank.
 STUART.
 : 4th Feb. On this the appellants were infeft on 4th Feb. The ap-
 pellants had advanced considerable sums before taking in-
 feftment, and sometime thereafter a sum was drawn from
 this account amounting to £16,253.
- Mr. James Stein became bankrupt, whereupon the re-
 spondent, his trustee, raised a reduction of the above secu-
 rity and infeftment, upon the ground, *inter alia*, That it was
 a security for debt *to be contracted*, which was struck at by
 the act of Parliament 1696, c. 5, and made it of no force
 for advances or debt contracted *after the date of the sasine*.
 In answer, it was admitted by the respondent, that the secu-
 rity must stand for such sums as were advanced *before the*
 Jan. 24, 1789. *date of the infeftment*, but not for those sums advanced sub-
 sequent thereto. The Court of Session reduced the con-
 veyance, in respect "that the infeftment for security of
 "Newnham and Co., cannot avail them for any sums paid,
 "or obligations undertaken by them posterior to the 4th
 "Feb. 1788, and appoints the defenders to give in a state
 "of all sums paid, or obligations undertaken by them, pro-
 "vious to the said date." On representation, the Lord
 Ordinary adhered, 16th June 1789; and, on reclaiming peti-
 tion to the whole Lords, the Court adhered;* and on ap-
 Nov. 14, 1789. peal to the House of Lords, their Lordships affirmed. (25th
March 1791).

* LORD PRESIDENT CAMPBELL said:—"The evil meant to be remedied by the clause of the act 1696, which relates to securities for future debts, was the granting of securities without value actually existing at the time, but upon the expectation or chance of value to exist afterwards. This had sometimes been practised, and had always been liable to be used as a cover for fraud, by enabling the common debtor to deceive fair creditors, and collude with confidential friends, by excluding some, and assuming others, and so ranking and preferring them at pleasure.

"The words of the statute are clear and explicit. There is no evidence that it was occasioned by the case of Langton, (No. 146, p. 1054, Dict.), as has been supposed. In that case, the debt was indefinite as well as future. However, the enactment is certainly not confined to that particular case. It is broad and general, and it marks the *futurity* as the prominent criterion.

"The circumstance of a deed being indefinite as to the sum, is

On the case coming back to the Court of Session, the respondent moved a new ground of objection to the deed, even as to those advances made *prior to the infestment*, which was this, that the conveyance and assignation was

1794.

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v.
STUART.

not at all mentioned in the act. Perhaps it was thought there was the less reason to provide a remedy for that case, as an uncertain and unknown encumbrance could not be sustained even at common law, being inconsistent with feudal principles, and with the security of the records. This, however, was for sometime a disputed point, as appears from a case in July 1730. Creditors of Crawford, observed by Kaimes in his Dictionary, vol. 2, p. 67, (see Personal and Real), where his Lordship mentions that it was debated, but not determined, whether clauses burdening the subject disposed with the grantor's debts in general, without mentioning any particular debt, rendered these debts real or not. "But thereafter, it having been found, in appeal to the House of Lords, that such general clauses create no real burden, the Lords ever since have been in use to determine according to the judgment of the Higher Court." The cases here alluded to by Lord Kaimes, are discovered from b. ii. tit. 3, § 50 of Erskine, where the following passage appears:—"A clause charging the lands contained in the grant, with the dis-poner's debts, in general terms, without mentioning the names of the creditors, was, by repeated decisions in the cases of the creditors of Lovat, Coxton, and Kersland, (see Personal and Real), adjudged to constitute a real burden on the lands disposed in consequence of the right competent to all proprietors, of disposing of their property under such condition and limitations as they shall judge proper. But *two* of *those* judgments having been reversed in the House of Lords, the Court of Session did, in July 1734, Creditors of M'Lellan, (see Personal and Real), and by several later decisions, alter their former rule, upon this principle, that no perpetual unknown encumbrance ought to be created on land; because, the purchaser cannot, by the strictest inquiry, know who the creditors in that burden are, so as by a proper process to force the production of their grounds of debt, in order to clear them off."

14 Nov. 1789.

1st Feb. 1793.

The Act 1696, then, was made not for cases of uncertainty, but for cases of futurity; and as to this last, it could make no difference with regard to the principle of the act, and the possible mischief meant to be provided against, whether the precise sum which was to be the *ne plus ultra* of the contraction, was fixed or not. Suppose, for instance, a man has an estate worth £20,000, and this is the extent of his whole fortune, although he specify this sum in a deed, there is as much room for abuse, as if no sum had been named. He might have named £100,000; but ought this to be considered in the light of a definite obligation?

"It is not necessary to subsume fraud. The sole question under

1794. inept, and good for no part of the sum, in respect that it
 ——— was granted for an indefinite and uncertain sum. It was
 NEWNHAM, &c. answered, that this was an assignation to a security in which
 v. the sum was definite, and not a security granted for an in-
 STUART. definite sum on a land estate.

Feb. 1, 1794. On report of the Lord Ordinary, the Court found, “The
 “ conveyance granted by James Stein of the heritable bond
 “ granted by Robert Stein to him over the lands of Kin-
 “ caple was an indefinite security, and therefore cannot be
 “ sustained so as to create a preference to Messrs. Newnham,
 “ Everett, and Co., in a question with the other creditors of
 “ James Stein, and therefore reduce, decern, and declare.”*
 Against this interlocutor an appeal was brought.

the act is, Whether the security infer a debt already existing, or
 a debt to be contracted? The case of Dempster against Kinloch,
 (Rem. Dec., vol. 2, p. 233; *voce* Right in Security), which has been
 mentioned, was attended with great difficulty, on account of the ob-
 ligation which Dempster had undertaken to advance the balance at
 any time, upon requisition of forty days. Lord Elchies argued with
 some force, that this was equal to an actual advance; but Lord
 Arniston and other judges observed, that the other party was not
 bound; therefore no debt was actually contracted. The present case
 is attended with much less difficulty. Neither party is bound. For
 a cash credit may be withdrawn at any time.

“ In the case of Neblie, No. 211, p. 1154, there was an absolute
 conveyance, and it was thought the receiver could not be bound to
 denude, till completely indemnified. The case of Bank of England
v. Bank of Scotland, 1st March, 1781, Fac. Coll., No. 41, p. 72
 (*voce* Right in Security), was more applicable. The case of Pick-
 ering, No. 212, p. 1155, is in point.

“ There is a peculiarity in the present case. The security to Newn-
 ham, Everett, and Co., is indisputably indefinite. The original
 security of Robert Stein to James, was indeed definite; it was for
 £12,000. But the estate vested by that security in James, was by
 him conveyed indefinitely, without any mention of the extent of the
 cash credit.

“ It appears, in fact, £16,000 has been advanced. Newnham, Eve-
 rett, and Co., therefore, if the security be good, must rank for
 £16,000, to the effect of drawing in proportion to that sum, and not
 in proportion to £12,000. This must form an insuperable objection
 to the security.”

Interlocutor 1st February, 1794.

* LORD PRESIDENT CAMPBELL.—“ The sum is indefinite; see note
 on former case, 14th Nov. 1789. The argument in p. 18, &c.

Pleaded for the Appellants.—1. The act 1696, which has express relation to securities for indefinite sums, does not strike against such securities, in so far as granted for sums advanced before the date of infeftment; but as to “debts to be contracted after the sasine or infeftment following on the said disposition or right, without prejudice to the said disposition or right as to other debts as accords.” The plain inference and meaning of the latter clause is, that, as to debts contracted before the date of such sasine or infeftment, the security will be unquestionably and perfectly good; otherwise, the reason for fixing on the date of the sasine, and declaring all inept after it, but without prejudice to all contracted before it, would have no intelligible meaning whatever. 2. If good to this extent, it must be good in all events and circumstances, and whether the sum for which it was granted be definite or indefinite. But really and truly the objections to it as an indefinite security, does not apply, because the act as interpreted by the decisions of your Lordships, refers to indefinite securities, as *burdens* or *charges* on land; but this is not the case of a burden or charge on the property, when the possession is in one person, and the demand or alleged lien in another; but the present is a *total conveyance* of the property or subject intended to be the security, and a complete change of the possession, though under reversion. It therefore humbly appears, that though an indefinite burden cannot be created on landed estate, in form of an heritable bond, or the like, yet it does not follow that an heritable bond or security, with which an estate stands already burdened to a certain precise extent, may be conveyed and assigned in security of sums to be contracted to an indefinite extent.

Pleaded for the Respondent.—The difference between heritable and personal estate in the question at issue, is obvious, and founded on the soundest expediency and policy. The legislature, for the security of landed estates, on the one hand, and to prevent frauds on the public, on the other, has declared that no heritable securities for future debts should be effectual. This was done by the act 1696, which declares all such debts ineffectual after infeftment. The appointment

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very ingenious, (namely, that it was an assignation only to a security in which the sum was definite), but I doubt if it be solid.”

LORD JUSTICE CLERK.—“I cannot distinguish between a land estate and an heritable bond. Impignoration of moveables is different, for the moveables are in the creditor’s possession.”

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of the public registers would be no security if such infestments were good, because it would be impossible to know the extent of such burdens from the records. The security here granted being therefore indefinite, can have no effect whatever as a preference. 2d. The distinction taken between burdening landed property, with an indefinite security, and conveying in security an heritable bond, which already burdens a land estate with a *definite* sum, is a mere piece of ingenious refinement. An heritable bond is heritable property, and, in the true sense of the term, an heritable subject; so that argument on this part of the case comes to nothing; and the appeal therefore falls to be dismissed.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *R. Blair, W. Grant.*

For Respondent, *Rob. Dundas, Jas. Boswell.*

[M. 2136.]

WM. KEITH, Accomptant in Edinburgh, Trustee on Sir Robert Maxwell's estate, } *Appellant;*
 SIR WM. FORBES, Bart., JAS. HUNTER & Co. } *Respondents.*

House of Lords, 11th June 1794.

RANKING—CAUTIONER—RELIEF—CORREI DEBENDI.—Three parties became bound, conjunctly and severally, in a personal bond for the sum of £10,000, borrowed for the use of one of them: the other two being mere sureties, and having bonds of relief granted. The principal became bankrupt, and nothing could be derived from his estate. One of the sureties also became insolvent, and the other being obliged to pay the whole debt. Held that the latter was entitled to rank on his co-surety's estate for the whole debt paid by him, to the effect of recovering the one half due by him. Reversed in the House of Lords, and held that he was only entitled to rank for the one half of the debt, each of them having been indebted as principal for a moiety thereof; and as surety for the other moiety.

Sir Robert Maxwell of Orchardtown, Bart., Patrick Heron of Heron, Esq., and Robert Maxwell of Cargen, Esq.,

had occasion to borrow money upon personal bond, to the extent of £10,000. Sir Robert Maxwell and Mr. Heron were mere securities for Robert Maxwell of Cargen in this transaction; but were taken bound, conjunctly and severally, as principal obligants, the latter granting bonds of relief to them. Mr. Maxwell of Cargen became bankrupt: his estate paid nothing over paying preferable creditors secured thereon. Sir Robert Maxwell's affairs also became insolvent, and he executed a trust deed to the appellant Keith, for behoof of his creditors. The credit and stability of Mr. Heron was also shaken, but his friends, the respondents, Sir William Forbes & Co., interposed on his behalf, came forward, and paid for him the debt, they getting an assignation to the same from the creditors. The sum paid was £6479. 12s. 8d,

The estate of Sir Robert Maxwell was sold by Mr. Keith, his trustee, for behoof of the creditors, and Sir Wm. Forbes & Co. ranked on the funds of this estate for the whole debt, to the effect of recovering one half of the amount payable by Sir Robert Maxwell as a co-surety. Mr. Keith refused to rank for the whole, but only for the half; and thereupon action was brought against him. It was maintained by the trustee, Mr. Keith, that Sir Wm. Forbes & Co. were no better than trustees for Mr. Heron, and that Mr. Heron being, together with Sir Robert Maxwell, merely sureties for Mr. Maxwell of Cargen, each could only have relief against the other to the extent of one half of the debt, which either might pay as surety for Mr. Maxwell,—that all therefore that was due from Sir Robert to Mr. Heron, was one half of the original debt, in respect of his paying the whole, the other half having been extinguished by Mr. Heron, the other co-obligant, for his own account, and for which he has no relief against him, and no right even to rank upon it to the effect of entitling him to recover full payment of his debt. For the pursuers (respondents) it was maintained;—that they came in the right of creditors, and were entitled to all the privileges of such. That they were by law entitled to come against either of the co-obligants bound conjunctly and severally, or either of their estates, and to exact payment of the full debt. And if all or any of the obligants become bankrupt, they may insist to be ranked in solidum upon any of their bankrupt estates, or upon all of them, under condition always of not drawing more than full payment of their debt. Accordingly, though law concedes this

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right to a creditor, yet it does not overlook the interests of co-obligants, or affect the relief *inter se*, because, although one co-obligant pay the whole debt, and in virtue of his assignation from the creditors, rank for the whole on the estate of his co-obligants, yet this is only to the effect of recovering from him the one half of that debt which he ought to have paid. Therefore it follows in the present case, that Mr. Heron having paid Sir Robert Maxwell's one half of that debt, as well as his own, is entitled to rank on the whole debt, to the effect of recovering that one half. If such would have been the right of the original creditors in these bonds, so must it be the right of the respondents, their assignee. Or if such was the right of Mr. Heron, as one of the *correi debendi*, supposing Sir Wm. Forbes & Co. mere trustees for him, so ought it to be to the respondents—that once the creditor is satisfied, the next object of the law is to adjust the rights of the co-obligants themselves, so that payment of the debt may be made to fall equally on both; and that a creditor cannot, by an arbitrary use of his diligence, be allowed to prevent this equal division of the debt among them.

Feb. 8, 1792. On report to the Court, the Lords, of this date, found
 “ the defender, William Keith, as trustee for Sir Robert
 “ Maxwell's creditors, is bound to rank Patrick Heron and
 “ Sir Wm. Forbes and Co., as trustees for him, upon Sir
 “ Robert Maxwell's funds, for the whole sums due upon
 “ those debts, in which Mr. Heron and Sir Robert Maxwell
 “ were jointly bound along with Maxwell of Cargen; but
 “ under this condition, that, in consequence of their being
 “ so ranked, they shall not draw more than one half of said
 “ debts, and decern.”* On reclaiming petition the Court

* Opinions of Judges :—

LORD PRESIDENT CAMPBELL.—“ This is a question of relief among co-cautioners, where one of them is solvent and another bankrupt, and the former having paid upon an assignment from the original creditors.

“ It is maintained that Mr Heron's personal demand can only be for one-half against his co-cautioner, Sir Robert Maxwell's estate; and if by Sir Robert's insolvency he should not recover twenty shillings in the pound, there is no help for it. He must take his chance with the other creditors, as there is no legal ground upon which, by enlarging his debt in the ranking, he can indirectly obtain a preference over them. In the case of Tilloch's creditors, June 1776, Sess. Papers, Vol. 31, No. 85, the reverse proposition

adhered, and remitted to "the Lord Ordinary to hear parties further upon any specialties in the situation of the debts claimed on, and to do therein as to his Lordship shall seem just."

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Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—Of the sum paid by Mr.

was maintained, *e.g.* that the creditor should not be allowed to rank for the full debt upon the estate of the insolvent obligation, but should first take his payment from the solvent person, leaving him to claim against the estate of the bankrupt co-obligant; but the Court thought that the creditor might do either the one or the other as he pleased.

"But, in the present case, it may make a difference, that the estate of Sir Robert Maxwell was disposed for his whole debts, which may be said to be equal to an attachment for the whole, at least as the creditors were entitled to claim for the whole upon the estate so disposed—and this right belonging to them, is assigned by them to Heron, who is fairly entitled to avail himself of it.

"Suppose both estates bankrupt, they would be put into a very unequal situation, if one is to be ranked upon the whole and the other for the half. On the other hand, I doubt if the trust-deed made any particular lien."

LORD JUSTICE CLERK.—"Heron paying the whole debt, could only have adjudged, or done diligence against Sir Robert Maxwell for the one-half. But the case is different here. Sir Robert conveyed his estate for *whole* debts, including this, therefore the estate is pledged for the *whole*. Mr. Heron is entitled to use that pledge for operating his relief to the full extent of one-half. It is not merely a personal claim. When Heron got assignation from his creditors, he got it not only to the extent of his own personal claim, but to the whole extent, to the effect of relieving him of the half. The case of Sommervell, 3d December 1751, in Falconer, was different. He could not adjudge for the *whole*, when *one-half* was paid."

LORD SWINTON.—"I think he can only claim for *one-half*."

LORD ESKGROVE.—"I am of Lord Justice-Clerk's opinion."

LORD PRESIDENT CAMPBELL, on further advising, said,—"The interlocutor seems to be right. The trust having been accepted of and acquiesced in by all parties, the estate of Cargen became thereby applicable to the payment of this whole debt, as well as other debts; and Mr. Heron, when afterwards called on to pay it, was entitled to an assignation to this security, whole and entire, to the effect of relieving himself of one-half."

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Ante, vol. ii.
p. 437.

Heron to Cargen's creditors, one half was the debt of Mr. Heron himself; for the other half he was a creditor to Sir Robert Maxwell, and to that amount only is he entitled to rank on Sir Robert's estate: And no principle of law or justice can authorize him to extend his claim beyond the amount of his debt. This is so obviously founded on reason and justice, as to be generally recognized in principle, and sanctioned by the invariable practice of accountants. It is no doubt true, that co-cautioners being mutually bound in relief to one another, the debt must be equally borne by all; but this holds only as to the *obligation to pay*, and not to all cases of *actual payment*. The one paying is not entitled, in all events, to full payment, because, as in this instance, consistently with the rights of other creditors, such full payment cannot take place where there is an insolvency, and no funds to pay creditors in full out of Sir Robert Maxwell's estate, and where to do so would be giving him a preference to all the co-cautioner's other creditors. It is equally clear that Mr. Heron, by paying and getting an assignation to the whole debt from the creditors, does not stand in right of those creditors to the full amount of that debt, but only to the extent of one half—the other half being discharged and extinguished as a debt due by himself. The difficulty arises from confounding the present case with that of a creditor having two obligants bound to him, and one of them being bankrupt, he claims first upon his estate, ranking for the full debt, and then upon the other. The case of Speirs and other creditors of Dunlop v. Thomas Dunlop and others, trustees of Carlyle and Co., has no analogy to the present case. That was a case of supposed double ranking, but in fact a ranking on two different grounds of debt; 1st. The partnership of Carlyle and Co. ranking for the debt due to them as a company by Dunlop, one of its members; and, 2d. The creditors of Carlyle and Co. ranking for the share of the debt for which Dunlop, as a partner, was liable.

Pleaded for the Respondents.—The relief among *correi debendi* abstractly from the circumstances of the loan or valuable consideration, arises either from each being equally bound to the obligee or creditor; or from a mutual contract implied by the law between them, by which each is bound for the whole debt. This is the nature of their relation to the creditor. As between themselves, if one is called on to

pay the whole, he has relief against his co-surety for the share he has been compelled to pay for him as co-cautioner, and is entitled to demand an assignation to the whole debt, in order to operate his relief, and to make good his co-surety's half. The *correus* who thus pays can only effectuate his relief by suing as in full right of the debt. In the present case, every principle of equity supports this view of the law; because, in ranking, he ought not to be put in a worse situation than if he were suing under an assignation to the whole debt. He ought therefore to be entitled to rank for the whole debt, to the effect of recovering the one half paid for Sir Robert Maxwell.

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After hearing counsel, it was

Ordered and adjudged that the interlocutor of the 8th Feb. 1792, complained of in the appeal be affirmed, with the following variations, viz. after the word (for) insert (half), and after (the) leave out (whole), and after (Cargen) leave out to the end of the said interlocutor, and insert (each of them having been indebted as principal for a moiety thereof, and as surety for the other moiety).—And the cause was ordered to be remitted back to the Court of Session to proceed accordingly. And it is farther ordered and adjudged, that the interlocutor of the 23d of Feb. 1792, also complained of, so far as the same is repugnant to the interlocutors of the 8th Feb. 1792, varied as aforesaid, be reversed.

For Appellant, *W. Grant, W. Adam.*

For Respondents, *Sir J. Scott, J. Anstruther, Allan Maconochie, Wm. Tait.*

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FALLIJEFF, &c. v. ELPHINSTONE, &c.	MAJOR MICHAEL FALLIJEFF of St. Peters- burgh, Merchant, Owner of the Vorst Potomskin of St. Petersburg, and Sir Wm. FORBES, Bart., his Attorney,	}	<i>Appellants;</i>
	The Honourable Wm. ELPHINSTONE, Owner, and JOHN GARDNER, late Master of the Paisley of Carron, a private Ship of War,	}	<i>Respondents.</i>

House of Lords, 12th March 1794.

(House of Lords, 14th August 1784.)*

CAPTURE — ILLEGAL PRIZE — DEMURRAGE AND DAMAGE.—Held, where the vessel belonged to a neutral, but was bound for Cadiz with a cargo of hemp to that port, at the time Spain was at war with Great Britain, and was captured by an English privateer, and taken into Leith, and detained there for some considerable time, without proceeding to have her condemned as lawful prize, or the papers, master, and crew of the vessel examined, that the capture was illegal. And in respect that it was so declared in the Court of Admiralty; Held the owner liable in demurrage and damages from the date of the capture to the day in which the vessel was freely given up, and made fit to proceed on her voyage.—Vide note below, First Appeal. Disputes having arisen as to the precise items of the damage and the demurrage, Held that demurrage was due at the rate of 10s. per ton per month of the vessel's tonnage: That a premium of insurance for £5337, the sum for which the cargo had been insured: That the ship's repairs for damage sustained since capture, and also for damage sustained after she set out on her voyage, by running on the coast of Ireland, &c. were due.

For the report of the first part of this case, see Note below,* which ended in an appeal to your Lordships on 14th August 1784.

* The privateer, called the Paisley of Carron, commanded by John Gardiner, and belonging to the respondent, Mr Elphinstone, captured. in the month of January 1781, the Vorst Potomskin, with a cargo of hemp for the use of the Spaniards, then at war with Great Britain.

It was stated by the respondents, that on examining the ship's papers, and conversing with the master and crew, there seemed to

In consequence of the remit back to the Court of Session, 1794.
in that appeal, the parties proceeded to investigate the a-
mount of demurrage and damages. The appellants gave in FALLIJEFF, &c.
a condescendence of the damages, and afterwards an addi- v.
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be no doubt that the cargo was Spanish property, and a lawful prize. The ship was bound for Cadiz ; the Russian master and crew, who had navigated her from St. Petersburg, had been changed at Elsinore, and a Danish Captain and crew put in to navigate her from that place to Cadiz. She had double clearances on board, had no Elsinore pass, without which no vessel whatever comes out of the Baltic—her bills of lading bore date St. Petersburg, July 1780, six months antecedent to her capture, and yet she was captured within ten days' sail of that port. On being boarded, the captain admitted the cargo was enemy's property, and a good prize. In short, the circumstances of suspicion were so strong as to warrant the taking her to the nearest British port, it being impossible at that season of the year to examine the cargo at sea.

On the other hand, it was stated, that the ship's papers, which showed clearly the property, and that there was no contraband article on board, were immediately delivered to the captors, but none of the privateer's people could read them ; and, without the least examination of the cargo, they carried the vessel first to Methel, and then to Leith in the Firth of Forth, after detaining her at Methel for nineteen days. The ship's papers were carried off by the respondent, Mr. Elphinstone, but were not brought into any Court of Admiralty, neither were the master or crew examined, or any one step taken by the captor, which, by the law of prize, and his Majesty's positive instructions to privateers, were required. In short, nothing was done to have the vessel adjudged as prize. They soon thereafter discovered that the seizure was illegal, and then made offer of the papers, and to let the vessel go on her voyage.

But, in the meantime, both the vessel and cargo had sustained damage, and the vessel could not proceed to sea without repairs. While the appellant, Fallijeff, had written to Sir William Forbes to attend to his interest, and to make a claim for damages, demurrage, and other charges. An action was brought in the Court of Admiralty for these, accordingly, as well as for the loss in replacing the insurance, which was assured for £5834. After this action was brought into Court, the repairs of the ship being completed, and the cargo reloaded, the appellant applied to the Judge-Admiral to declare the ship and cargo were neutral property, not subject to any claim on the part of the pretended captors, and that the vessel might proceed on her voyage. No answer was given unto this applica-

1794. tional condescendence. By the first, they claimed under
 ——— the former judgment appealed, the sum of £3070. 11s. 7d.;
 FALLIJEFF, &c. and by the second £3120. 3s. 5d. The whole vouchers were
 v. not lodged in process till 18th January 1785.
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May 8, 1782. tion, and the Judge-Admiral pronounced an interlocutor in terms as
 craved, and the vessel accordingly proceeded on her voyage.

In the meantime, the action for damages, stipulated at £3000,
 proceeded. In defence, it was stated, that the defenders could be
 liable in no damages, owing to the suspicious circumstances attend-
 ing the ship and cargo, and the conduct of the master and crew
 affording just and probable grounds for suspecting that the cargo was
 lawful prize. A joint proof was allowed and taken, and, upon con-
 sidering which, with the memorials for both parties, and proof led,
 in which it was proved, that the captain of the vessel captured had
 said on boarding her, that the vessel was neutral property; but that the

Feb. 23, 1783. cargo might be lawful prize, the Judge-Admiral, of this date, absolv-
 ed the respondents from all the appellant's demands; and on re-

July 11, — claiming petition, adhered. A reduction of this decree was brought
 before the Court of Session. But the Lord Ordinary and the Court

July 11 and affirmed the judgment of the Judge-Admiral.

29, 1783. Against these interlocutors an appeal was taken to the House of
 Feb. 12, 1784. Lords.

After hearing counsel, it was

Ordered and adjudged, "That notwithstanding the cause of seizure
 afforded by the demeanour and express declaration of the pursuer,
 the master of the vessel in question, that the cargo was good prize,
 but that the vessel was not so; yet, in respect that, in the said
 Court of Admiralty, it was, among other things, on the 8th day
 of May 1781, at the instance of the pursuers, declared and adjudged
 in this cause, That the said ship and cargo are neutral property,
 and free of all claims made against the same by the defenders;
 which order was not reclaimed against; and also, in respect that the
 defenders took upon them to detain the said ship and cargo, claiming
 the same, or one of them, as prize, without proceeding in any manner to
 obtain condemnation thereof, or bringing or sending any part of the
 company of the said ship before the judge of the Admiralty Court,
 to be sworn and examined upon such interrogatories as might tend
 to the discovery of the truth concerning the interest and property
 of such ship and cargo; or bringing or delivering to such judge
 all the papers, documents, and writings delivered up, or found on
 board the said ship; it is further declared, That the defenders are
 liable and responsible to the pursuers respectively, and according to
 their rights, for the demurrage of the said ship; and also for such
 damages as the said ship and cargo may have sustained by reason
 of the detention thereof from the day of capture, to the said 8th

In the former branch of the case, the respondents had stated, that when the vessel captured was brought into Leith Roads, they had given notice to the captain that he might proceed on his voyage. This notice was given by a notary public, under the form of an instrument of protest, on 14th February 1781; and was renewed next day in same manner. At the same time, the respondent Mr. Elphinstone, offered to give security for any damages which might be awarded against him; but that the captain refused to proceed on his voyage, on the pretence that the vessel had sustained some damage. The vessel did not sail from Leith till the end of October.

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It was, on the appellants' part, stated that the vessel had received considerable injury, and could not proceed to sea without a thorough repair, which rendered necessary the unloading the cargo, and loading the vessel again. That she had proceeded on her voyage as soon as the repair was effected; and having been cast ashore on the coast of Ireland in proceeding on that voyage, they were entitled to the damage sustained both before leaving Leith as well as that sustained after it. The claim for damage under the first head, that is, before leaving Leith, the respondents contended, that it could only be for damage which the appellants could instruct the vessel sustained subsequent to the capture of the vessel. From the proof led, no such damage was established, although it was attempted to be proved, as had all along been asserted, that she had sustained damage in getting her keel hurt in going into the port of Methel.

As, according to the judgment of the House of Lords, it was of importance to have it fixed at what date the vessel

day of May 1781, on which day, it appears, by the minute of the pursuers preferred to the said Court of Admiralty on the 3d day of May 1781, the said ship was ready to depart, unless the defenders can instruct that the said ship and cargo had been before that time freely, absolutely, and unconditionally, delivered up to the pursuers, or so tendered; and in that case, to such time as the said ship and cargo might have been made ready to depart, after such surrender or tender thereof. And it is therefore ordered and adjudged, That the said several interlocutors complained of in the said appeal be, and the same are hereby reversed, so far as the defenders are thereby absolved. And it is further ordered, that the said cause be remitted back to the Court of Session in Scotland to proceed accordingly."

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was freely and unconditionally delivered up to the pursuers, in order to fix the quantum of demurrage; the parties judicially agreed that Sir Wm. Forbes' declaration that he considered the vessel delivered up, if not prior, at least on the 26th Feb. 1781, as equivalent to an oath. Upon which the Lord Ordinary found: "That there is sufficient evidence that the ship was freely, absolutely, and unconditionally relinquished and delivered up by Captain Elphinstone to Sir Wm. Forbes upon the 26th Feb. 1781; but that Captain Elphinstone is liable in demurrage, and other charges occasioned by the capture, till the ship was fit to go to sea, which was upon the 13th day of March said year."

Aug. 10, 1786.
 Feb. 9, 1787.

The Lord Ordinary, on representation, reported the cause to the whole Lords, who found "That the vessel was freely, absolutely and unconditionally delivered by the defender, upon the 16th Feb. 1781, but that the defender is liable in demurrage on account of capture from the 18th day of January, the day on which the capture was made, to the 30th day of March, both in the year 1781: Also find the pursuers entitled to the expenses incurred in the unloading the cargo, and to the premium of insurance on the £1000 for which, it is alleged, that insurance could not be procured: Find the pursuers entitled to interest on the price of the cargo, from the said 18th January to the 30th day of March 1781, and likewise to the Town dues, light money, harbour dues, pilotage claimed, so far as the same can be properly instructed: And, lastly, find the pursuers entitled to expenses, &c. and remit to the Lord Ordinary to ascertain the quantum of demurrage, expense of unloading and reloading the cargo, the above articles for town dues, and to hear parties thereon, and in particular, whether articles 16th, 17th, and 19th of the condescendence, No. 2 of the exhibits, ought to be considered part of the expense. Sustains the objections to the claim of expense for reparation done to the vessel and for other damages done to the goods, and to all other articles of the condescendence other than those above mentioned."

Mar. 3, 1787.

The respondent reclaimed against this interlocutor, insisting that he could not be liable for a premium on that part of the cargo which had not been insured, and that there was not sufficient evidence of the value on board. The Lords remitted to the Lord Ordinary to hear parties as to the quantum of the cargo insured, but *quoad ultra* adhered.

The Lord Ordinary ordered a condescendence of the articles claimed under the interlocutor; and, upon considering which, with the answers thereto, he pronounced this interlocutor: "Sustains the objection made to the first article of the condescendence to the extent of £18. 18s. 11d., for men's clothes, and £7. as paid to Russian sailors, which two sums being deducted from £90. 13s. 7d., the amount of article first of the condescendence, leaves a balance of £64. 14s. 8d. due for the expense of unloading and reloading the vessel, for which sums finds the defender liable. With regard to article *second*, the demurrage, the Lord Ordinary *in hoc statu* makes avizandum therewith. Sustains the *third* article of the condescendence, extending to £318. 12s., being the premium of insurance of £4000 commission at one half per cent., and one-fourth per cent. paid for guaranteeing the underwriters. With regard to the *fourth* article, being the premium claimed for the £1000 said to have been short insured, sustains the objection to the extent of £220 sterling, the value of the goods sold at Leith; and also of £533, as the amount of the damage which the pursuer himself has stated is sustained by the cargo; but finds that the policies of insurance to which the defender appeals as evidence that an average of six and one half per cent. upon the goods was received from the underwriters, affords no evidence whatever upon the subject, and therefore repels the objection, in so far as founded upon that particular. As to article *fifth*, finds the pursuer entitled to interest upon what shall in the issue appear to be the value of the cargo from 18th January 1781 to 30th March thereafter. Sustains the *sixth* article of the condescendence. Finds the defender liable in such a proportion of the *seventh* article of the condescendence, being town dues, light money, &c. amounting to £18, as shall be found to correspond to the period from the said 18th Jan. to the 30th March 1781. Finds that articles *tenth*, *twelfth*, and *thirteenth*, are repelled by final interlocutor of Court. Sustains the objection to the expenses of the appeal, being article eleventh, and assoilzie the defender therefrom, in respect the judgment of the House of Lords gives no costs, and that it finds the defender liable only for demurrage and for such damages as the ship and the cargo may have sustained by reason of the detention thereof. Finds the defender liable in article 14th, being the expense of process in the Court of Admiralty and Court of Session, and decerns. And as

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“ to the remaining articles of the condescendence, being
“ articles eight and nine, appoints the pursuer to specify
“ in writing, by way of minute, the trouble for which these
“ articles are severally charged.” Of the same date, “ the
“ Lord Ordinary remitted to shipmasters both at Leith and
“ at the port of London, to report from the invoices, bills of
“ lading, or other evidence to be laid before them, the
“ tonnage of the said ship Vorst Potomskin, with power to
“ examine such persons as may have seen and inspected said
“ vessel, the better to enable them to make their report.”

Both appellants and respondents represented, the former
in so far as he was not found entitled to the premium of
insurance on the full sum of £1000; the latter, in so far as
it allowed for any premium at all, and also, in so far as it
gave £64. 14s. 8d. as the expense of unloading and reloading
the vessel, and the expense of process. The Lord Ordinary
refused the prayer of the respondents' representation; and
in the representation for the appellants, sustained the objec-
tion “ to the premium for £1000 short insured to the ex-
“ tent of £220, as the value of the goods sold at Leith,
Aug. 9, 1788. “ and £533 as loss sustained upon the cargo, in respect
“ these particulars are now properly explained from the pur-
“ suers' original condescendence; *Quoad ultra adhere.*”

Thereafter the Lord Ordinary, on representation, recall-
ed “ the interlocutor represented against, and of new
“ sustains the objections made to the first article of the
“ condescendence, to the extent of £18. 18s. 11d. for
Mar. 11, 1789 “ men's clothes, and £7 as paid to Russian sailors, which
“ two sums being deducted from £90. 13s. 7d. the amount
“ of article *first* of the condescendence, leaves a balance
“ of £64. 14s. 8d. due for the expense of unloading and re-
“ loading the vessel, for which sum finds the defender liable.
“ With respect to article *second*, finds that the ship Vorst
“ Potomskin is to be held of 200 tons burden; and finds
“ the defender liable in damages from 18th Jan. to 30th
“ March 1781, inclusive of both days, at the rate of ten
“ shillings per ton. Sustains the *third* article of the conde-
“ scendence, extending to £318. 12s., being the premium of
“ insurance for £4000 commission at one half per cent., and
“ one-fourth per cent. paid for guaranteeing the underwrit-
“ ers. Sustains article fourth, being the premium of insur-
“ ance for £1000 with commission. As to article *fifth*, finds
“ the pursuer entitled to interest upon what shall, in the
“ issue, appear to be the value of the cargo from 18th Jan.
“ to 30th March 1781 inclusive. Sustains the *sixth* article

“ of the condescendence. With respect to the 7th article,
 “ finds the defender liable for the light money, and in such
 “ a proportion of the town dues, harbour dues, &c. as shall
 “ be found to correspond to the period from said 18th Jan.
 “ to 30th March 1781. Finds the defender also liable in
 “ such part of article eighth and article ninth as corresponds
 “ to the foresaid period from said 18th January to 30th
 “ March. Finds that the articles tenth, twelfth, and
 “ thirteenth are repelled by the final interlocutor of the
 “ Court. Sustains the objection to article eleventh, and as-
 “ soilzies the defender therefrom, in respect the judgment
 “ of the House of Lords does not give costs, and that it
 “ finds the defender liable only liable for demurrage, and
 “ for such damages as the said ship and cargo may sustain
 “ by reason of the detention thereof. Finds the defender
 “ liable in article fourteenth, being the expenses of process
 “ in the Court of Admiralty and Court of Session, so far as
 “ the same are reasonably charged, the amount thereof to
 “ be afterwards ascertained when the particular accounts
 “ come to be advised. Finds interest due upon the several
 “ sums above decerned for other than the expenses of pro-
 “ cess, from the date of the citation in the Admiralty Court,
 “ until payment, and decerns.”

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Both parties applied to the Court for an alteration of the
 above interlocutor, in so far as adverse to them, and the
 Court found “ that the ship Vorst Potomskin is to be held
 “ of 217½ tons burden, and that the defender is liable in
 “ demurrage at that burden, from 18th Jan. to 30th March
 “ 1781, inclusive of both days, at the rate of ten shillings
 “ per ton per month : Modify the article of agency charged
 “ for Sir Wm. Forbes and Co. to £60 sterling, but allow the
 “ article of £30 charged as paid to Mr. Muldrup, and finds
 “ the defender liable in such part of the said articles as cor-
 “ responds to the aforesaid period, from the said 18th Jan.
 “ to 30th March 1781 : and remit to the Lord Ordinary to
 “ proceed accordingly; and also to hear parties procurators
 “ further with respect to the premium on the £1000 said to
 “ be short insured, and to do as he shall see cause; and,
 “ with these variations, adhere to the interlocutor of the
 “ Lord Ordinary reclaimed against.”

Nov. 18, 1789.

The cause having returned once more to the Lord Ord-
 nary, his Lordship, after hearing parties, pronounced this
 interlocutor:—“ Finds the defender liable to the pursuer
 “ in the sum of £261 sterling of demurrage, at the rate of
 “ 10s. per ton per month from the 18th Jan. to the 30th

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“ March 1781, of the ship Vorst Potomskin, which is to be
 “ held of 217½ tons burden; sustains the pursuer’s claim
 “ for £55. 12s. of premium, with commission on the £1000
 “ short insured, and finds the defender also liable to the
 “ payment of the same. Finds the defender further liable
 “ in £52. 12s. 9d. sterling of interest from the above men-
 “ tioned period of detention upon £5337. 10s., as the value
 “ of the cargo on board the ship. And with regard to the
 “ town dues, light money, harbour dues, and the sums for
 “ agency to Sir Wm. Forbes and Co. and the Danish Consul,
 “ included in the 7th, 8th and 9th articles, as in the afore-
 “ said state, amounting together as now restricted by the
 “ interlocutor of Court, to the sum of £108, for the whole
 “ period from 18th Jan. to 30th March 1781, and decerns
 “ accordingly; and further decerns against the defender for
 “ the sums for which he is found liable by interlocutor of
 “ 11th March 1789—namely, £64. 14s. 8d., being the ex-
 “ pense of unloading and reloading the vessel; £318. 12s.,
 “ the premium of insurance; and £6. 9s. 2d. sterling, the
 “ shoremaster’s dues, and of interest of the whole sums a-
 “ bove mentioned, from citation until payment. Modifies
 “ the accounts of expenses in the Admiralty to £82 ster-
 “ ling: modifies the expenses in this Court previous to the
 “ appeal to the House of Lords, to the sum of £63 sterling,
 “ and modifies the expenses, since the cause was remitted,
 “ to £140 sterling, agent fee included, and decerns for the
 “ same and dues of extract.”

The appellant appealed to the House of Lords against the interlocutors of the Lords of Session of the 9th Feb. 1787 and 18th Nov. 1789, and against the several interlocutors of the Lords Ordinary of the 20th July 1787, 11th March, 25th June, 18th July, 9th Aug. and 25th Nov. 1788, and 14th Feb. and 11th March 1789, and 8th of March 1790, in so far as the several sums claimed by the original action, and stated in the condescendences put in by him, are not decreed to be paid to him, or are in any way modified or restricted. And the respondents have entered a cross appeal in so far as they are thereby subjected to the appellants’ claims.

After hearing counsel, it was

Ordered and adjudged that the respondents do pay to the appellants the sum of £890. 8s. 7d., being the amount of the different sums mentioned in the report of the register of the Court of Admiralty as due for demurrage and damage. And it is further ordered and ad-

judged, that the parts of the interlocutors complained of, by which the respondents are decreed to pay to the appellants the sums of £82, £63, and £140, together with the expense of extracting the decree, be affirmed ; and that the said interlocutors be in all other respects reversed.

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For the Appellants, *Sir J. Scott, William Adam.*

For the Respondents, *W. Scott, J. Anstruther.*

NOTE.—The result of this interlocutor was to sustain the claims made for demurrage at 10s. per ton, and also part of the claims made for damages, such as the premium of insurance on £1000 short insured, and also for that insured ; the sums for unloading and reloading the vessel ; the amount of repairs for the vessel, and the harbour and other dues.

[M. 16853.]

Mrs. AGLIONBY or LOWTHIAN, Widow of RICH-	}	<i>Appellant ;</i>
ARD LOWTHIAN, Esq., - - -		
JOHN MAXWELL and Another, trustees of	}	<i>Respondents.</i>
GEORGE ROSS, - - -		

House of Lords, 11th June 1794.

SETTLEMENTS—EXECUTION OF SETTLEMENTS BY NOTARIES—SOLEMNITIES REQUISITE—INCOMPETENT WITNESS.—A deed of settlement and other relative deeds, were executed by a person blind, and partly deaf, by the aid of notaries. The deeds, before being signed, were not read over to him, so as to make him understand, or to be heard ; nor were they read over to him in the presence of the witnesses, nor was any mention made in the notaries' docquet, that they were so read. Held, the deeds of settlement void and ineffectual in law. Also, held that the agent for the appellant in this cause, and who had also been agent for her deceased husband, was an incompetent witness for her.

This was a reduction brought of certain deeds of settlement, executed by Richard Lowthian in favour of his wife, settling his whole heritable and moveable estate in Scotland, worth £70,000, on her and her heirs and assigns. He

1794. had also heritable estate in England, which was conveyed
——— to her in liferent, and to the respondents as trustees, for
LOWTHIAN George Ross, his heir at law. He died without issue in
v. May 1784, survived by his wife, who entered into possession.
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By his marriage contract, the deceased had made ample provision in favour of his wife, which she thought proper to conceal, and pretend ignorance of. Besides, he had executed a settlement in 1774, in favour of George Ross, which the appellant swore had been destroyed. About this date Mr. Lowthian became so blind, as scarcely to discern light; so deaf as scarcely to hear, and his faculties of mind were also impaired. All his settlements, until about this time, and prior to 1776, were in favour of his nephew, George Ross. Subsequent, however, to this, the appellant was in use to direct her husband's men of business, who were only continued as they complied with her will. In George M'Kenzie, writer, Dumfries, she found an assiduous agent, and on his death, his brother Simon was employed. By them the several settlements brought under reduction were executed, at the request, and on the employment of the appellant, and which set aside the previous settlements in favour of George Ross. The grounds of the reduction were: 1st, That the deceased was in dotage, and not of a sound disposing mind, so that he was incapable of understanding the effect of the deeds. 2d, That being both blind and deaf, the deeds were not executed with all the solemnities which in such a situation were necessary and requisite in law. 3d, That he was fraudulently imposed on and deceived in their execution, he not knowing their true import, and not understanding that they disposed of so much of his fortune to his wife.

The case went to proof. Mental incapacity was not much rested on, but facts were proved, which showed that his wife, or some other, managed business for him. An objection was taken to a witness adduced for the appellant, namely, her own Edinburgh agent in this cause, who had also been agent for her husband, to prove his perfect capacity, on the ground that he was, as agent, inadmissible to prove any fact previous to the raising of this cause. The objection to his testimony was sustained by the Court, in respect he was agent for the appellant in this cause. The third ground was established by evidence of a misunderstanding which existed between Mr. Lowthian and his wife, as to the import of these deeds, which was attempted to be explained

by a letter from the agent who drew them out. Also by an unwillingness shown on the part of Mr. Lowthian to sign the last deed.

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But the chief ground rested on was, that the deceased, being blind and deaf, the deeds were not read over to him in presence of the witnesses, in a way and manner so as to make them be sufficiently understood; and that the notaries' docquets did not bear that they were read over to the deceased in presence of the witnesses before being signed.

The deeds themselves afforded evidence that the notaries' docquet did not mention that they were read over. And in regard to the actual reading of the deeds, the evidence was conflicting. But the points were, supposing them to have been read: Were they read in such a manner as to be understood by Mr. Lowthian? and, 2d, Whether they were read in presence of the testamentary witnesses?

The evidence as to the first general settlement in favour of the appellant, was that the deed was read over very rapidly,—one of the witnesses stated, so rapidly, and in so low a tone of voice, as that Mr Lowthian could not comprehend it, although the other witnesses thought that the deceased understood it. Again, as to the subsequent general settlement, one of the notaries swore he *did not recollect* in what manner it was read over, although it was read completely and distinctly, and Mr. Lowthian comprehended it. Two of the witnesses recollected nothing about it; but the other two say that it was read over in their presence distinctly. As to a later deed,—one of the notaries to the deed swore, that it was purposely read over in a way that Mr. Lowthian might not understand it. In particular, when he came to Mrs. Lowthian's name, and also as to some other legacies, it was read in a low tone of voice. One witness to the signing of the deed was dead. Another says the deed was read hastily, and in a way the deceased, he thinks, could not understand it, and the fourth corroborated him.

But the argument which the appellant urged was, that the reading of the deed in the presence of the notaries and witnesses, was not a statutory solemnity,—that all the statutory solemnities were complied with,—that the statute 1681, c. 5, only declared that the witnesses be witnesses to the subscription of the notary, and also to the command given him. That they are not bound to know the contents of the deed, but called to attest the notary's docquet: That the two essentials are two notaries, and four witnesses,

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who see and know the party whose deed is to be authenticated; and, 2d, That they should hear and see him grant and give warrant to the notaries to subscribe for him, and in token thereof, see the granter touch the notary's pen. That all these having been complied with, and the notaries' docquet having mentioned all these, the deeds thus executed, with the full solemnities, ought not to be allowed to be set aside by parole evidence of facts, which the statutes do not declare necessary, *de solemnitate*. If the reading of the deed in presence of the notaries and witnesses, be not a requisite of the statutes, so neither could the mentioning of it in the notaries' docquet be a requisite. And it was a question of grave moment to the law, whether any of the notaries and witnesses, after having authenticated these deeds in the usual manner, and had legally attested that every thing was done "*rite et solemniter actum*," could be admitted as evidence to contradict and destroy what they had so solemnly authenticated. They humbly maintained that they could not be so admitted, and therefore, ought to have been *in toto* rejected.

On the other hand, it was maintained, that distinction was to be taken between statutory solemnities, and the solemnities which the law, over and above these, have declared to be essential in certain situations. That law has declared the reading of the deed executed by notaries in their presence, and the presence of the witnesses, to be an essential; and declaring it so, it also declared, that whatever was done *de solemnitate*, should be mentioned in the notary's docquet. That assuming the proof to be conflicting and doubtful on the point of the deeds being read over in such a way as not to make them understood to the deceased, yet the fact of reading of them not being mentioned in the docquet, was decisive against the validity of the deeds. But the proof in reality is strong and positive, that they were not read over in such a way as to be understood. Some of the witnesses and notaries do not recollect, but want of recollection will not do. They must speak positively to their own act, otherwise the deed will not stand; but such of them who do recollect, are clear that the deeds were read rapidly, and in a low tone, to a deaf man.

The Lords sustained (of the date 3d July, 1792), "The reasons of reduction of the settlements, dispositions, assig-
" signations, and other deeds, bearing to be executed by the
" deceased Richard Lowthian of Stafford, as generally and

“ particularly libelled : As also find the destination or sub-
 “ stitution conceived in favour of the defender Mrs. Sarah
 “ Aglianby, and her heirs, contained in the assignations, bonds,
 “ and other writs or securities libelled, are void and null, and
 “ to be held *pro non scriptis*, in as far as they might have
 “ the effect of vesting the same in, or carrying the succession
 “ thereof in favour of the said defender, to the prejudice of
 “ the heirs at law.”

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They also, of same date, refused a reclaiming petition as to the admissibility of Mr. Currie. On reclaiming petition against both, the Court adhered. *

Nov. 20, 1792.

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—“ In considering this important case, we must attend :

“ 1. To the nature of the challenge, and the requisites of the law in executing the deeds of a blind man, who is also partly deaf.

“ 2. To the circumstances attending the execution of these deeds, the actual situation of the testator, and the import and effect of the deeds themselves.

“ 3. To the conclusions in law that ought thence naturally to arise.

“ The deeds of settlement are challenged as unduly obtained from an old man, blind and dull of hearing, and on the ground of not being properly executed.

“ The granter was not destitute of capacity to make a will ; and it is admitted that he was not entirely bereaved of understanding, but only reduced to a weak state by infirmity and old age, so as to become an easy prey to those who were about him.

“ How far importunity, and other circumstances denoting influence, are relevant, see Swinburn's Treatise on Testaments, p. 77, &c. Voet. lib. 28, tit. 1, § 10. Julius Clarus, lib. 3, quest. 37, &c.

“ The material points to be attended here, are the blindness and deafness, and what precautions are necessary in the execution of deeds by a person in those circumstances, and how far these have been observed in the present case.

“ When a deed is to be executed by a person in health, possessed of the faculties of mind, and having the organs of sense entire, if the testing clause be regular, everything fair will be presumed, unless the contrary be proved. When witnesses are called in, and desired by the party himself to attest his subscription, they cannot reasonably doubt that a person who can read or hear, and who has all his senses about him, has actually read or heard, has given the necessary instruction to his man of business, and is satisfied that the writing is right.

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Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The deeds in question are *ex facie*, regular, and being executed with all the solemnities,

“But if the party whose deed is to be attested is, by disease or other circumstances, rendered unable to see and hear in the usual manner, or can only do so in part, or with difficulty, and, in short, must trust to the fidelity of others, it is plain, both in reason and in law, that some further precautions are necessary. It ought to appear from evidence, that the deed was his own voluntary deed, and sufficiently understood, that instructions were given to make it out in these terms, and that there was no deception, but everything explained and known to the party and all present.

“Presumptions must always give way to truth; and as it is certain that a blind man cannot read, there must be positive evidence that the paper which he is to sign, or rather, which is to be signed for him, has been read and explained to him.

“In the execution of a deed of settlement, or any writing of importance, although he might be able to adhibit his scrawl (signature?) it is much more fit, and the law expects, that two notaries and four witnesses should be called in. And these must be *in præmissis specialiter requisiti*, i. e. they must attest the fact of being authorised and required to subscribe a certain deed for the party, which deed, therefore, of course must be made known to them.—*Vide* Stair, Galloway v. Duff, 5th December 1672; Kilkerran *voce* Writ, 18th June 1745; Birrel, 9th January 1752, Falconer; Erskine, p. 429; Dict. Vol. 2, p. 536, 25th June 1760; Fairholmes v. Myler, 1st July 1767, Rolland; Trotter v. Trotter, Sess. Papers, Vol. 2, No. 24; Crawford of Doonside v. Trustees of Crawford, Sess. Papers, Vol. 38, No. 27 (App. to Mor. Dic.); case of M'Arthur v. Williamson, &c. Vol. 45, No. 37; Weir of Kirkwood v. Gibson, Vol. 40, No. 7; Brown v. Chalmers, Vol. 40, No. 78 (App. to Mor. Dic.); Jerdon v. Scott, 17th Nov. 1789. (Mor. p. 4964).

“In Bacon's Abridgment *voce* Wills, one of the cases put of a will being challengeable is, where the husband is in weakness and distress, and the wife, attending upon him, induces him by flattery to give her all. Another is, If the friends of a sick man, of their own hands shall make a will, and bring it to a man in the extremity of sickness, and read it to him, and ask him whether this shall be his will, and he says, yes, yes. Swinburn, p. 78, says, “when the “sick man's kinsfolk, or some other person, do cause a testament to “be written after their inditings, and then afterwards the same be “read unto him, and he being demanded whether the same shall “stand for his testament? Answereth yea, and shortly after dieth, “in this case the testament is not good.” And a pleasant story is

ties which the law requires, and which are usual in practice, when the granter is in the situation Mr. Lowthian was, they must stand unquestioned and unquestionable, in so far as

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told by him of a monk, &c. See also, Voet, Lib. 28, tit. i. § 10.—Julius Clarus.

“These authorities are mentioned, in order to show that sometimes even reading to the testator, and receiving an affirmative answer, is not sufficient. Cases of this kind must depend upon circumstances. The great and leading principle is, that the will must appear to be spontaneous and deliberate, not the effect of fear, compulsion, fraud, or strong importunity; and, above all, in the case of a blind man, it must be proved that what is called his will is truly so, and that it proceeded from himself; and that the contents were fully known to and authorised by him; and some proper means must be taken to substantiate and to identify the instrument containing that will.

“These are not *statutory* solemnities attending the execution of the deed, but requisites *in modum probationis*, to obviate fraud and deception. They arise from the nature and necessity of the case, and there may be different modes of authentication, and of proving the identity.

“The most simple and natural seems to be this, that when a man of business is employed to execute the will of a blind man, he should take care to receive his instructions in presence of two creditable witnesses; he should set down the heads of them in writing in presence of these witnesses, and one duplicate may be left in their hands, another used by himself in extending the deed, and these same witnesses being again called upon to attend at the execution of the deed, the extended instrument ought to be read over, and fully explained in presence of the testator, and compared by them with the previous instructions; and another precaution seems also to be proper, viz. that two duplicates should be made of the will itself, one to be deposited in the hands of one or other of the witnesses, or of some trust-worthy person, and another put into the custody of the testator himself, or those about him.

“The will of a blind man cannot be concealed like that of a person who has all his senses about him. It ought to be made known at least to two persons of honour and veracity, who may be afterwards called upon to support it by their evidence.

“The law of England may perhaps be satisfied with one witness. The law of Scotland requires two, and this cannot be dispensed with.

“In the present case, the deeds are not destitute of legal solemnities, for the notary’s docquet is formal, and all the statutory requisites have been observed. The objection does not lye upon statute,

1794. these solemnities are concerned. By statutes 1579 and
LOWTHIAN 1681, when a person cannot write, he may authorize two
v. notaries to subscribe for him, in presence of four witnesses,
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but upon common law, and consists in the want of legal proof, not the want of legal form.

“Had the instrumentary witnesses been called upon to prove, contrary to their attestation in the docquet, as to the subscription of the notaries, or the testator’s giving a symbolical mandate by touching the pen, and had any of them sworn to the contrary of what they attested, it would have been doubtful whether such evidence could have been received, or at least could have been credited.—See Burrow’s Reports, Vol. 4, p. 2225. Our law does not differ from the law of England in that particular.

“But the evidence here is of quite a different nature. It goes to extrinsic facts, which in all the cases of a blind person are essential, viz. the authority given to execute a will of a certain tenor, the knowledge of the testator, and his assent to the tenor so read and written ; and, in short, that this deed, which was neither written nor read by him, and which was composed, written, and subscribed by others, at his desire, is truly the deed which he had a deliberate purpose of executing.

“That it was fairly obtained, and not the effect of fraud, force, or any illegal practice, may be presumed, if once his knowledge and approbation of the deed are sufficiently instructed ; but it requires something more than the notary’s docquet to show that the deed was truly his. At least this will be required if the proof is extant, though possibly, at a great distance of time, and after all persons concerned are dead and gone, the docquet itself may establish a presumption, unless something very irrational, absurd, or inconsistent, shall appear upon the face of the instrument itself, or unless collateral written evidence shall appear to defeat any presumption that can arise from the docquet ; and it is always a material circumstance, one way or other, that the deed appears to be consistent *with*, not contrary *to*, former deeds or settlements.

“It is said that there is sufficient proof of *enixa voluntas* here to give the whole to Mrs. Lowthian. Were this clearly established by legal evidence, it would go far to support the deeds. But prior to 1774, we have not the vestige of any such intention, further than to the extent of reasonable provisions, and it is an unfavourable circumstance in her cause that neither the deed 1774, nor any scroll or copy of it, now appears. The opinion of counsel, p. 12, of 2nd Appendix, speaks of it as a deed in favour of Mrs. Lowthian and *other legatees* ; and from the close of the opinion, at letter G, it would seem that some part of the Scotch succession was settled on Mr. Ross. The opinion further shows, that not only the deed itself was

he at sametime touching the notaries' pen, as evidence of his authority; and as the statutes take no account of the

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then extant, viz. Aug. 1775, but a copy or scroll which was shown to the counsel, and probably the memorial upon which the opinion was given, contained a fuller description of it, but the opinion is produced without the memorial, though it is seldom that an opinion is preserved without the relative case. Again, we see from Mackenzie's letter, 1st Appendix, p. 49, that Mrs. Lowthian was the executor named in the deed 1774, but it is not there said either that she was residuary legatee, or that there were not special legacies in favour of Ross, (N.B.—Ross was then in favour), and other relations, or that any part of the heritable succession was included. The same letter bears expressly that the deed 1774 was extant, and in force as far down as January 1776, when the first deed now under challenge was executed. Mrs. Lowthian says, in her deposition, State, p. 140, C., that the deed 1774 was destroyed by Mr. Lowthian in his lifetime, but she ought to have added, that it was destroyed after January 1776, long after he was blind, and consequently with the assistance either of her or some other person about him; and it is singular that not only the deed itself, but the scroll or copy, and the memorial to counsel, should all have been destroyed, when all the succeeding deeds should have been carefully kept.

“ The deed of 1776 is said to be the best authenticated of any of those under challenge. In one respect it is so.; viz, in so far as Mr. Maxwell of Carrochan swears to a previous reading either of the deed or scroll. In other respects it is more exceptionable than any of them. It is clear from the evidence of both Maxwell and Staig, that the reading at the period of execution was not such as could convey any knowledge to the testator. It was meant that even the witnesses, who had their sense of hearing entire, should know as little as possible of the matter. Of course the testator, whose sense of hearing was very imperfect, as well as his eye-sight gone, must have known much less of what was then doing in his presence. To a fact of this kind the evidence of Kay and Clark, two inferior persons, evidently prejudiced in favour of the defender, must go for little in competition with two such witnesses as Staig and Maxwell. The above low witnesses have greatly exaggerated, and been directly refuted in some particulars sworn to by them; and the evidence of Graham, the assistant of M'Kenzie, is infinitely more exceptionable.

“ As to Maxwell's account of the previous reading, it is enough that the law of Scotland does not admit such a fact to be proved by one witness; and besides, he seems to have proceeded very much upon confidence in M'Kenzie, gave himself little trouble in explain-

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cause which may disable a party from writing, whether from blindness, or from never having been taught, it is reasonable

ing, and no attention at all to the after execution, so as to establish with sufficient clearness the identity.

“ Besides, it is a remarkable feature of this deed, that it conveys in express terms the testator’s whole estates, real and personal, in Scotland, and even all that he should die possessed of, whether acquired, or devolving upon him by succession, and whether consisting of lands, tenements, tythes, debts due by mortgage, heritable bonds, &c. (1st Appendix, p. 14, letter K). And yet M’Kenzie’s letter, (p. 50, letter D), says that the heritable subjects were not meant to be at all conveyed by that settlement.

“ It is no less a fatal circumstance to this deed, that M’Kenzie did, by the form of it, take the whole residue to himself, though it was afterwards confessed that no such thing was meant, and this was but partially set to rights by the codicil, (p. 20), which was articulated by its nature to the personal estate, leaving entirely out the heritage, which had become very considerable, as heritable bonds are heritage by the law of Scotland.

“ In short, both the principal will in 1776, and codicil in 1778, are, upon the face of them, and by written evidence, proved to be fraudulent deeds, independent of the parole evidence, so that there is an impossibility of supporting them.

“ All the other deeds were clearly executed in a most improper manner, without the least appearance either of previous instructions, previous reading, or due reading and explanation at the time. Such of the witnesses as deserve any credit at all, agree in this. To say nothing of M’Kenzie, the evidence of Wilkin and Johnstone, Widors and Lockerby, is remarkable, nor is there any reason to suppose that the ceremony of reading at the period of execution, would be differently performed from what it was at the first and leading deed.

“ Besides, the private letter from M’Kenzie, and the memorandum by Graham, and the fact of reading the bonds in an improper manner, leaving out the destination, are such invincible proofs of fraud, that they are sufficient to outweigh whole volumes on the other side. Every attempt to explain these written documents, has proved ineffectual and desperate, so that, upon the whole, no doubt can remain, that the deeds ought, all and each of them, to be laid aside.

“ The proof of *general intention* in favour of the defender, *i. e.* to leave her a considerable portion of his effects, and trusting the execution to others, however strong, would not be relevant. We do not admit *nuncupative* wills; and in such a case confidence must be excluded, because the law requires that the deed should be wholly the party’s own. See the case of Crawford of Doonside.

to presume that if, in either case, these solemnities were required, the deeds so executed would be unexceptionable. All these solemnities have been complied with in the present case, yet the deeds have been challenged on those very grounds,

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The general intention was clear, and he trusted in very honourable men, viz., Sir Adam Ferguson, &c.

“ The strongest circumstance in support of the deeds, is the delay of the challenge till the death of Carruthers of Dormont, who was witness to the last deed in 1782. But his evidence, if alive and favourable to the defender, would scarcely be sufficient against the other circumstances, particularly the evidence of Wilkin, who also witnessed the codicil to the last deed, joined to that of Staigs, and the written proofs already mentioned. He would be a single evidence to the fact of previous reading, if we suppose that he would say so, for the support he has from M. Black, (p. 203, B), is very slender. She is a low, suspicious witness, in the service of the defender, and evidently exaggerates in some circumstances in the leading questions put to her. She is likewise a legatee, and has an interest in supporting the deeds. Most of the other legatees are persons who will succeed by law. In both the cases of Crawford of Doonside and M'Arthur, the Court went chiefly upon the circumstance of the deed not being read. In the former case it was said, “ When
“ the author of a deed who has his senses entire, and can read, ad-
“ hibits his subscription to that deed, your Lordships will presume
“ that the deed has been considered by him previous to the sub-
“ scription being adhibited, knowing that the understanding of men
“ will induce them to examine the contents of their deed before
“ they adhibit their subscription to it.” But it was observed that there was no room for presumption in that case, as it was an ascertained fact, that Mr. Crawford had no opportunity either of reading or hearing read, and that no previous scroll was made.

“ In the other case, it was said by the judges, in delivering their opinions, that Miss M'Arthur, though in distress of body, was not incapable to make a will, but that no evidence appeared that she had either given previous instructions, or read the will made for her: That although it was a general presumption that a will, duly authenticated by the subscription of the party, and of the instrumentary witnesses, had been previously read and considered, yet this presumption might be taken off by contrary circumstances, that the will was irrational, being against her father, who was her nearest heir, and seemed to be the effect of a combination of those about her.”

LORD ANKERVILLE.—“ There is no evidence of any intention in favour of the wife prior to these deeds. After he was blind, the testator fell into the hands of his wife and M'Kenzie, and the deeds were then procured by fraudulent means.”

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namely, that they were not read over to the deceased at execution. But this is not made a statutory solemnity. When a person who sees, and can read writing, although he cannot write, makes a will, the legal presumption is, that he has read and

LORD ABERCROMBIE.—“The deceased was capable of testing. But he was blind, and his hearing impaired. The question is, Whether these deeds were executed according to law? The act 1681 prescribes the regulations without distinction. If able to read, the presumption is, that he has read it. But in the case of a blind man, the witnesses and notaries must be satisfied that authority is given; and no other method but reading can be admitted, and the identity must be clear. The inconvenience of publishing settlements of this nature, is much overbalanced by the advantages to the law, and to the rights of individuals. The deeds here were worse than if they had not been read at all. They were purposely misread. I am, therefore, for reducing the deeds, as not sufficiently read and explained even independently of fraud. But there is evidence of fraud besides.”

LORD JUSTICE CLERK.—“I am of the same opinion as to capacity. Regarding the objection as to the execution of the deeds. Upon looking into them, a point of law occurs, namely, that where writing is essential any defect in them cannot be supplied by parole evidence. If the deed is not formal, it is null and void. In the case of a person possessed of all his faculties and senses, there is no occasion for reading the deed. But where he cannot sign, he must have notaries; and the whole must be read over and done *unico contextu*. Nothing can be taken upon the authority of another, even if it were proved by two witnesses, that one or other of them had authority. Suppose both the notaries had read the deed in another room, this is not enough; for when they came before the witnesses, another deed may be substituted. The docquet, therefore, ought to bear that it was read, otherwise there is no legal evidence of its being the deed of the party.”

LORD MONBODDO.—“The necessity of reading implied. The deeds were not read sufficiently here; and the case is the same as if the testator was deaf as well as blind.”

LORD SWINTON.—“I am of the same opinion.”

LORD PRESIDENT.—“Of same opinion; but not essential that the notary's docquet should bear that they were read.”

LORD DREGHORN.—“Of same opinion with Lord Monboddo.”

LORD ESKGROVE.—“Whatever was his intention, it was not executed in a proper manner; but the assignation of the debt due by Ross seems to be in different circumstances.”

“The Court reduce the whole deeds under challenge.”—President Campbell's Session Papers, vol. 67.

understands the writings. When a party defective in sight is obliged to sign by notaries, the presumption is, that the instrument has been dictated by him, and read or explained to him by the notaries. In either case the witnesses are only called to the signing. When he signs himself, they are witnesses to his subscription. When he signs by notaries, they are witnesses to the notaries' attestation. In no case is it necessary to read the deed to him in presence and hearing of the attesting witnesses. It may be expedient to do so, in order that they may bear witness of the fact in case of a challenge, and if they swear that the deed was, in point of fact, read, then there is an end to every objection. This is just precisely the situation of the deeds now challenged. It would be truly impolitic and unjust to allow, after an interval of time, any inquiry into uncertain and fanciful speculations, as to whether the deed, when read, was so read as not be understood by the deceased. No doubt, when the deed is impeached on fraud, every inquiry is legitimate, but still the question always is, and will be: Whether, by the way in which the business was conducted, a fraud was actually perpetrated, not whether one was possible? In the present case, after the most searching scrutiny, not a vestige of fraud is traceable to the appellant. The proof of such allegation, which lies on the party asserting or affirming it, has therefore entirely failed. 2nd, Then again, as to the deceased's capacity, it is proved incontrovertibly, that, down to the period of his death, he was in possession of such strength of mind as well enabled him to direct how his fortune should be disposed of; this, coupled with his proof of good sense, his memory and attention, and anxiety in regard to his money affairs, and their settlement after his death, entirely disproved this part of the case. 3d, The only question which then remains is, whether the deeds set forth the genuine will and intention of the deceased? Now, as there is no pretence for saying that he actually died, or intended to die intestate, and when there is so much collateral evidence in letters, apart altogether from these deeds, to show that his intention always was to give the appellant the fee of his estates, the deeds ought to stand. By the Court refusing to admit Mr Currie as a witness, the appellant has been deprived of evidence duly tendered by her, which would not only have established her husband's capacity, but would have explained some of the letters and other writings produced in the cause.

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Pleaded for the Respondent.—Mr Lowthian, though not entirely deprived of understanding, yet, besides being blind and almost deaf, was so far impaired in his mental faculties, as to be an easy prey to such as meant to impose upon him; and certain persons, who had insinuated themselves into his confidence, concerted a plan for deceiving him in regard to his settlements. But these settlements being executed in such a manner, in point of form, as not to be read so as to be understood, and no mention being made in the notary's docquet of the reading of the deeds, the same were null and void in law. And the Court below adjudged rightly, in refusing the examination of the appellant's agent as a witness on her behalf, because he was an incompetent witness according to the law of Scotland.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellant, *Sir J. Scott, J. Anstruther, Wm. Honyman.*
For Respondent, *W. Grant, Geo. Ferguson.*

THE YORK BUILDINGS COMPANY,	.	.	<i>Appellants;</i>
ALEXANDER MACKENZIE,	.	.	<i>Respondent.</i>

House of Lords, 13th May 1795.

JUDICIAL SALE—COMMON AGENT—DISABILITY TO PURCHASE—FRAUD—HOMOLOGATION.—Held, that a common agent, in a ranking and sale, cannot purchase the estates sold under the ranking for his own account, though at a public judicial auction, and sale reduced, though he had been in possession unchallenged for thirteen years.

The estates in Scotland, belonging to the York Buildings Company, being brought to a ranking and sale, under the authority of the acts of Parliament, a part of them, consisting of the estates of Seaton, &c., was purchased by the respondent at a judicial auction, he being the common agent in the ranking and sale. The sale was reported to and con-

firmed by a decree of the Court; the respondent paid the purchase-money, had got charter from the Crown on his decree of sale, was infest, and had been for eleven years in the quiet possession of the estate, without any objection stated by any one to the validity of the sale, and had expended large sums in buildings and other improvements, when the present action of reduction was brought to set aside the sale.

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The grounds of the reduction were, 1st, That the respondent was disabled by law from purchasing, he being the common agent who conducted the proceedings in the ranking of the appellants' creditors and sale of their estates. 2nd, That he had acted fraudulently in concealing the value of the estate, or did not sufficiently promulgate its advantages. That he formed combinations to prevent others from bidding at or attending the sale, in order to secure it to himself; and, 3d, That he was guilty of neglect of his duty, as common agent at the sale, in allowing the estate to be knocked down to himself, and not moving for an adjournment, in order to give opportunity to other bidders to appear.

In defence, the respondent pleaded, 1st, That there was no law declaring the common agent in a ranking and sale disqualified from purchasing such estate at a public judicial auction. 2nd, That fraud was totally groundless, and the sale fair, open, and a large price given. 3d, That though the appellants wished an adjournment of the sale, yet, that the circumstances did not warrant such adjournment; and acquiescence for so many years in the sale, by the appellants and their creditors, is a sufficient bar against the plea of disability.

After proof and much discussion, the Court came, at first advising, to be of opinion that the sale was unexceptionable, by interlocutor of 6th December 1791.* But,

* Opinions of Judges on pronouncing the different interlocutors.

Interlocutor, 6th December 1791.

LORD ANKERVILLE.—“There is an unbounded confidence placed in writers. It likewise falls within the justice of this Court, on the one hand, to inflict exemplary punishment on them if found in the wrong, and to protect them if in the right.

“I am happy to have been able to form a satisfactory opinion for assailing the defender in this case. There is no room for distinguishing between the upset price, at which the estates were set up for sale, under the direction of Mr. Mackenzie, as common agent,

1795. on reclaiming petition, the Court altered, and in respect
 ——— that Mr. Mackenzie was common agent in the sale, they re-
 THE YORK reduced the same, by interlocutor, on 6th July 1792. And
 BUILDINGS CO. finally, on reclaiming petition for Mackenzie, the Court pro-
 v. duced the same, by interlocutor, on 6th July 1792. And
 MACKENZIE. finally, on reclaiming petition for Mackenzie, the Court pro-

and the competition price. The question is, Was it wrong for the defender, as common agent, to be purchaser at the sale?

“Second point, Whether there was fraud in his so doing? seems a late thought. There was nothing wrong in the preliminary steps taken by him in the sale; and the whole evidence on this point of fraud is a mass of contradiction. It is evident we cannot take it against what is afforded by the *record* of the facts made at the roup.”

LORD DUNSINNAN.—“I am of the contrary opinion. I admit that there was nothing fraudulent in the defender’s conduct, and that he has been unjustly charged. Here the creditors were pressing, (and it was necessary to effect a sale in order to satisfy them.)—Vide Lord Colville’s evidence. The defender had money to lay out; and, in my opinion, there is nothing in the circumstance of the rental to show that any undue advantage was taken. I lay the testimony of Braidwood aside altogether, and lay my opinion upon the duty of a common agent. His business as to the sale is, to make the subjects produce as much as possible. The incidents at the sale are likewise to be taken into view. The admitted facts are, that on the day of sale, precisely at the hour of four, the estate was exposed. The advertisement says between four and six o’clock. There is also the neglect of inserting a short advertisement in the Mercury. It was his duty to procure the highest price. A common agent may purchase where there is a competition; but the offering the upset price promotes nothing.”

LORD DREGHORN.—“There is an alternative conclusion in the summons, raised for restitution or damages.”

“As to the first and general point, I have no idea that the common agent may not purchase at a judicial sale, although this may depend on circumstances. Mr. Corrie’s opinion is sound; and I am persuaded, that if he (the common agent) had been desired to set up the estate again he would have done it. I am, therefore, for overruling the general objection. But we’ll watch his conduct with a jealous eye; but as to his conduct previous to the sale, I am of the same opinion with Taylor, (a witness). As to Braidwood, (another witness,) it is a mistake to put it (his testimony) on perjury. The defender did not deceive him in any way. No ground therefore for fraud; yet the defender has not done his utmost; and I must give the opinion that Taylor declines to give, and think he ought to be decerned to pay the additional price, which we see would have been given. The pursuer demands equity, and we must give

nounced this interlocutor, "they repel the reasons of reduction, sustain the defence, assoilzie the defender, and decern: And, in respect, one of the reasons of reduction was a charge of fraud against the defender, find the pursuers

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it him. Ergo, we are not to deprive him, (common agent) of his estate altogether, after a possession of thirteen years.

"The second lot was knocked down when the defender himself desired Mr Taylor to stop the hammer. Ergo, the lot ought to have been set up again. I am for giving no expenses on either side, as the charge of fraud is groundless."

LORD ROCKVILLE.—"Braidwood is clearly mistaken. There is no evidence of fraud; and there appears to have been a great deal of activity on the part of the defender."

LORD JUSTICE CLERK.—"There is not sufficient evidence to support a charge of fraud. The question turns entirely upon the duty of common agents. This office implies trust and confidence, and every mandate implies it. It is in his power to do great good or to do great harm, to the other parties concerned.

"Every trust is of the most sacred kind, and must be exercised with chastity and purity. There ought to be no clashing between duty and self-interest. A trustee is not entitled to take even those advantages which a stranger may take. His duty, as to the sale, is to bring the *highest* price. But a purchaser's object is to pay the *least*. I do not go on the parole evidence that has been adduced, but upon the record of the sale and the written evidence. His own letters show that he thought the upset price was below the value. He knew that Lot was worth £14,000 or £15,000. Ergo, he got an exorbitant advantage. Suppose he himself was not to offer, and that he knew that there was just *one man* in the room who would have got it at the upset price, his duty was to move the Ordinary to adjourn. If none but himself, and he had lain bye (from offering) it would have been adjourned of course. I do not approve of the concession, that he may purchase where a competition takes place. It is easy to get a friend to offer. Hence, the disability must be general. The proof led here, though insufficient to prove fraud, shows that these things are possible."

LORD MONBODDO.—"I was the judge at the roup. The sale just went on as usual; and it must have been at least half after four o'clock before the 1st lot was called out. I think there is nothing in law to disable a common agent from purchasing the estate at a public roup. But the question is as to his conduct in this particular instance. He knew that Braidwood was to bid, and asked if Braidwood had come. It was his duty then to move for an adjournment, or delay the sale for sometime that night, and the

1795. "liable in the expenses of the defender's proof, and ordain
 ——— "an account thereof to be given in; but find they are not
 THE YORK "liable for any expense of process." (Vide bottom note).
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 v.
 MACKENZIE. Against these interlocutors the present appeal was brought.

Session judge would have complied. See answers by the defender to the
 Papers. condescendence, where he seems to put the cause on that issue."

LORD ESKGROVE.—"As to the abstract question of law, a common agent is not *ipso facto* disqualified from purchasing at the judicial sale which he manages. But there ought to be such a law. When done, it must be without collusion. As to the special facts in this case, I cannot discredit Braidwood's evidence, without supposing perjury, but it is contradicted in every circumstance, and I must lay him aside. The defender knew that he was to be an offerer for the first lot, and it was rather an early hour, half after four o'clock, before first lot struck off. But he ought to have moved an adjournment."

LORD HAILES.—"I am for assoilzing the defender."

LORD PRESIDENT gave his opinion at very great length, (vide Sess. Papers). He said that,—"This challenge was maintained on two grounds.—1st, On the general argument taken from the duty of a common agent, and the nature of his trust. 2d, Upon special circumstances upon which fraudulent conduct was inferred." (He then describes the nature of the office of a common agent, and his duties in regard to the particular estate over the sale of which he was appointed to act and preside, and then proceeds):—

"But the case of a judicial sale is very different; for there the common agent, holding him to be a trustee or tutor, in the strictest sense, is not *auctor in rem suam* when he purchases fairly at the judicial sale. His right flows from this Court, and his own authority is out of the question.

"If his precedent duty has been faithfully performed, there seems to be little in principle as in positive law for barring his offer as a purchaser at the judicial roup, for at the moment of the sale he has no duty incompatible with it. His functions are at an end, or suspended, *quoad* the sale; and the business is then in the hands of the judge alone, whose duty it is to take care that everything is fairly conducted at that period.

"It is believed there is no common law rule any where else, against the exposor being himself an offerer, even at a voluntary sale, though with us it has been found illegal, 7th Aug. 1753, *Gray v. Stuart, &c.* (Mor. p. 9560). But the case of a public judicial sale is very different. *Emere possunt quilibet non prohibiti.* Voet. lib. xxviii., tit. 18.

"The common agent, no doubt, is bound also in duty to watch over the proceedings, even at the moment of the sale; but he has nothing in his power at that period, other than publicly suggest-

Pleaded for the Appellants.—The sale in question was *ipso jure* void and null, because the respondent, from his office of common agent, was under a disability and incapacity which precluded him from being a purchaser. The office of

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ing to the judge if anything appears to be wrong in the procedure; but, in the nature of the thing, there can be nothing wrong in offers being publicly made by intending purchasers, if these are not under the upset price; and there seems to be no implied restraint against the common agent from the nature of the duty which he has then to perform, more than against any indifferent person.

“Whether the judge himself lies under any restraint, is a question upon which a learned civilian has written a particular treatise, viz. *Matheus de Auctionibus*, lib. 1, cap. 10, N. 2, &c. But there is evidently more doubt as to the judge, because he would thereby make himself both judge and party; and although there are many instances of judges of this court having become purchasers at judicial sales, it is believed that in such instances the judge has declined sitting in Court when the sale was reported; and probably there is no instance of the Ordinary himself being a purchaser.

“It was admitted in the pleading that in case of competition, i. e. where other offerers appeared, the common agent might be the purchaser. This of itself shows that he lies under no general incapacity, and therefore, that we necessarily must have recourse to circumstances. The distinction aimed at between purchasing in competition, and at the upset price on first exposure, would scarcely be proper to be admitted as a general rule. It would be easy to manage matters so as to make a seeming competition without the reality; and, on the other hand, it may, and does often happen, that the upset price is the full value, and that the purchase at the first exposure is unexceptionable. A distinction of that kind would be arbitrary and unreasonable. The matter cannot be extricated without either a total disqualification, or none at all.

“The offers made by the defender appear to have been attended with benefit to the Company in three instances, viz., the third lot of Seaton, which yields £100 more than it would have done if the defender's offers were struck out. The first lot of Tranent, where a difference of £400 was produced by the joint purchase, in which the defender was concerned, and the purchase of Callender, where it is admitted on all hands that the defender's conduct was even meritorious. In the case of judicial sales at the instance of apparent heirs, it has been found that the pursuer is a *trustee* for the creditors, but this does not hinder him from being himself the purchaser at the upset price.

“Incapacities are not to be stretched, nor inferred by implication. But here, as far as analogy goes, it is against the rule contended for.

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common agent, in a ranking and sale, infers a natural disability, which, *ex vi termini*, imports the highest legal disability, because a law which flows from nature, being founded on the reason and nature of the thing, is paramount to all

Practice is likewise against it. See the instances which have been discovered on a search. (Note or list of authorities lodged in process, by order of the Court).

“If expediency requires an alteration, it must be done by some positive rule in future, and not having a retrospect.

“Some such disability is to be found in the civil law ; (Voet lib. 18, tit. 1, § 10) ; likewise our act 1695, for obviating the frauds of apparent heirs, and the act of Sederunt, 1708, concerning factors.

“The defender communicated his intention to Mr. Taylor and Mr. Hepburn, and it did not strike them that there was anything wrong, nor does it seem to have occurred to any of the agents present, that there was a disqualification, nor to Lord Monboddo, the judge, nor to the whole Court, when the sale was reported. The agents for the creditors, particularly the preferable ones, who were pressing for their payment, were entitled to hold him by his offer.

“This holds to the 2d branch of the cause, and here it is fair to consider both the defender's merits and alleged demerits.

“The researches made by him, and report published, were the first lights which this Court and the public received into the involved affairs of the Company. He refused to have any concern in acquiring debts, or raising money for creditors, though tempting offers were made, and though other gentlemen, members of this Court, were less scrupulous. Had he entered into combinations previous to the sales, to keep off purchasers, and to secure to himself and others the estates, or parts of them, at the lowest values, these would have been fatal to his cause. An instance of this kind occurred some years ago, where a joint purchase, in consequence of previous agreement among different intending offerers, buying off one another, was, to a certain extent, set aside. (Murray of Broughton, 1st March 1783. Mor. p. 9567.)

“The joint purchase in this case, of the first lot of Tranent in consequence of an agreement *subsequent* to adjournment, is liable to no such objection, as it had the effect of raising the price.”

“The division of the estate into lots, and bringing forward the sale of Winton, in the first place, is well accounted for, and was approved of by the Court. The creditors were clamorous for their money ; it was necessary that some one part of the estates or other should be first exposed. There was then no prospect of an end to the war, or to an immediate rise in the value of land. Preferable creditors were not obliged to wait. Winton was the most saleable, from its situation ; but setting up the whole at once, or even in

positive law. The principle is obvious. He cannot be both judge and party. He cannot be both seller at a roup and buyer; he cannot serve two masters. And he that is entrusted with the interest of others ought not to make that

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large baronies, would have been imprudent, as there were few monied men then looking after large purchases, their money being otherwise employed. Mr. Mackenzie acted in this, by the advice of intelligent men.

“As to what passed at the sale itself, the hour must have been fixed by the judge. It was within the time limited by the Court, and every person of business knows, that as it depends on the judge himself, at what precise hour within that limited time he will take his seat, so it was incumbent on every person intending to offer, to inquire either at the *clerk* to the process, or at the Ordinary's clerk, what hour the judge had fixed. This was no operation of the defender's, but of other official persons.

“In general, the time for the sale was the most proper of any, being the *middle of the winter session*, when all men of business are daily attending on the Court; and neither their own negligence, nor the punctuality of the judge, can be stated as a ground of complaint.

“After the Court was assembled for the business of this sale, the record itself bears that all the preliminaries were duly gone through, and the usual proclamations made.

“The parole evidence of what was done and said, and at what precise moment of time, at such a distant period, cannot be trusted. It would be most dangerous to admit of such a proof. The presumption is *omnia rite acta*, and the manifold contrarieties in this part of the evidence must prove decisive against the whole. One of the witnesses, *David Wight*, (p. 157, B.) says that the defender, when the first or second lot was under exposure, moved the judge to order it to be knocked down; were this fact true, it would be the strongest of any in the proof; but it is totally incredible, and not supported, although it must have attracted the notice of every man in the room. The judge himself, when the defender was declared purchaser, would have ordered the lot to be exposed again. (See *Robertson*, p. 118, E).

“In short, there is no sufficient evidence of any thing unusual having happened; and it seems to have been mere accident that the defender got the two first lots at the upset price. Had he not offered for these, it is probable that he would have bid for the two adjourned lots, and got them at the same rate. There must always be some one lot placed first, and some one last, unless they are all set up together; and it would be equally absurd to cut off the first lot, or the first two lots, upon the idea of their not being exposed,

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business an object of interest to himself; and as one who has the power will be too ready to use it, as an opportunity for serving his own interest at the expense of those for whom he is instructed to act, no such purchase so made by him

as it would be to abolish the first hour, or the first half hour of the business.

“ The strongest passage in the whole evidence against the defender, is what appears in the deposition of Mr. Taylor, (p. 193), that he could not rest the night after the sale, from apprehension lest, the defender having purchased these lots without any competitor, it might be ascribed to some previous plan or design to which the deponent might be expected to have an accession, &c. But the witness very plainly accounts for his own feelings. He was afraid of reflection upon the defender and himself, and, therefore, he wished there had been other offerers. But he does not say, or mean that the defender had done wrong in his opinion. On the contrary, he admits that he himself prompted him to offer for the second lot.

“ It was natural enough to expect that there would be reflections upon the defender, if it turned out that he had an advantage; but it is a different question whether there is any legal ground for depriving him of it, especially *post tantum temporis*.

“ The delay, in not questioning the sale, by whatever circumstances it may have happened, is material in his favour. A protest taken *de recenti*, *a caveat* entered against the validity of the sale. An objection stated either on the part of postponed creditors or common debtor, when the sale was reported, or as soon after as circumstances could be inquired into, might have had a different effect. The postponed creditors, whose agents were attending, though the company itself was absent, were supposed to have the same interest then that the common debtor is understood to have now. Why was there nothing done till the first strange edition of the summons was executed in 1784, and why was it then abandoned for five or six years longer?

“ Matters are scarcely entire, because, independent of that sort of title which arises from long possession and acquiescence, there is a great hardship in stirring a question of this kind at a distance of time, and it is very difficult to separate one's ideas of present value and increasing advantages, from those which would have taken place recently, had the matter then come to issue. We have clear proof that the value of land in market, was very different then from what it is now; and besides, there is a certain degree of jealousy which attends the situation of a man, who has by accident, obtained a considerable advantage in any transaction with another, and there are ways and means of raising a cry, which, even when ill founded, seldom fails to make some impression.

ought to have the countenance or support of law. The danger and temptation, from the facility and advantages for doing wrong, which a particular situation affords, does, out of mere necessity of the case, work a disqualification, nothing

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“It may be very expedient to make a regulation in future, in order to remove even a temptation of doing wrong in the case of a common agent, as was done in the case of factors, and by the act 1695, in the case of apparent heirs; but such regulation cannot justly have a retrospect. It is enough to say that the present case is not reached either by positive regulation, or by common law; though, at the sametime, the defender's character of common agent, is so far to be attended to, that if the smallest slip appears in his conduct, or even irregularity imputable to him, this ought to be taken hold of as decisive against him; but when the proof (in this case) is minutely dissected, it amounts to nothing of the kind, and therefore he ought to be assoilzied.”

“Sustain the sales, assoilzie the defender, and find pursuer liable in expense of proof.”

“For reducing the sale,—Justice Clerk, Eskgrove, Monboddo, Dunsinnan. For assoilzing,—Ankerville, Dreghorn, Rockville, Hailes, the Lord President.”

Interlocutor 6th July 1792.

LORD PRESIDENT.—(Vide former notes).—“A total voidance, to the effect of exposing the lands of new, when they have acquired a new and much higher value, would be very unjust. If there was any thing, the conclusion for reparation and damages may be attended to. Upon reconsideration, there seems to be more ground for Lord Dreghorn's proposition than was at first thought. See *Murray v. M'Whan*, 1st March 1793, (Mor. Dic., p. 9567). where the very point was considered, and the decision was accordingly. The reparation ought to be such as to do material justice to all. Both parties have studiously avoided this point. In the case of voluntary sales, although we do not allow a party to offer for himself, yet, in England, and other countries, it is believed there is nothing in law against it. See act 1773, c. 50, § 10. A purchase made by the party himself, may turn out to be no sale at all, but still it is not illegal. Our practice goes too far in holding it to be unlawful. But a purchase made by an agent, may be held to be for himself or his constituent, according to circumstances.

“Taciturnity and homologation still very strong, as the (Company) estate was understood to be bankrupt, and still turns out to be so, and the postponed creditors do not even appear yet.”

LORD DREGHORN.—“I am for adhering. A public judicial sale

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less than incapacity, being able to shut the door against temptation where danger is so imminent. The law has, therefore, wisely guarded against such temptation, by interposing the bar of disability in such situations. In the case of Keech

is a safeguard against fraud. As to the conclusion of damages, the pursuer does not insist on it."

LORD HENDERLAND.—"As to one of the lots, Sir A. Hope and Mr. Walker were excluded from information. Yet there are no sufficient circumstances of fraud. Braidwood is mistaken in some circumstances; but my difficulty is on the other point. If an agent means to bid, he ought to ask leave of his constituent, and have his consent. This does not exclude a posterior consent, even inferred *rebus ipsis et factis*. I am therefore for reducing upon the point of law."

LORD MONBODDO.—"I am for annulling" (the sale).

LORD ABERCROMBIE.—"The challenge is upon three grounds: 1st, Legal incapacity. 2d, Fraud. 3d, That he has had an undue advantage, although by accident. As to the first, the act of Sederunt contains no prohibitions. Mr. M'Kenzie acted only as an indifferent party. Neither the judge of the roup, nor the Court thought it wrong. Sales at the instance of apparent heir, and by a factor for a foreign merchant, the agent may purchase for himself. Even if there was an incapacity in a common agent purchasing, it is a question, whether, under all the existing circumstances, the creditors are now entitled to complain. Matters are not now entire. The defender paid up the price, and sale approved of. His money was gone, and could not turn it in any other way. 2nd, Ground of fraud,—not proved. As to 3d point, it is the nicest. Had Hunter and Braidwood been at the sale, a higher price would have been given; and the question thence arising is, What should be the effect of this? Should it be now reduced to the effect of setting it aside altogether, and at this distance of time expose it again? I rather think he is not responsible for these accidents."

LORD DUNSINNAN.—"I am for reducing."

LORD JUSTICE CLERK.—"The common agent is not like an apparent heir, for the last acts for his own behoof, and is entitled to do so; but an agent has no such character. It was his duty, as agent for the creditors, to make the challenge. It is his business to bring the highest price. Charges of fraud not proved; yet such things may be—it is in his power to practice arts and contrivances."

LORD ESKGROVE.—"Disqualified from bidding at all, whether that true or not."

LORD SWINTON.—"I am of the same opinion."

"Alter, and in respect Mr. Mackenzie was common agent in the sale, reduce."

v. Sandford, 31st October 1726, Lord Chancellor King said,
 “ It may seem hard that the trustee is the only person of all
 “ mankind who might not have the lease ; but it is very
 “ proper that rule should be strictly pursued, and not in the
 “ least relaxed ; for it is very obvious what would be the

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 Cases in
 Equity, p. 741.

Interlocutor, 8th March 1793.

LORD ANKERVILLE.—“ I am for adhering to the first interlocutor.”

LORD CRAIG.—“ I think there was no legal incapacity. But his capacity of common agent may be joined to other circumstances. If there be fraud, length of time in making the challenge would not wipe it off. But the circumstances are not sufficient to make out a case of *fraud*. Independent of actual fraud, there may be circumstances of impropriety in his conduct which may be sufficient. It is here that the difficulty lies. But the length of time and acquiescence are strong circumstances on the other side ; and, taking the whole together, there is not a sufficient relevancy.”

LORD MONBODDO.—“ I have altered my opinion, and am now for first interlocutor.”

LORD DREGHORN.—“ I was for a middle opinion, but this was rejected by the Court. The summons is alternative. I am for the first interlocutor ; but think we ought to award him to pay the difference in price. Clear, that being common agent is no good objection.”

LORD JUSTICE CLERK.—“ I am for the last interlocutor.”

LORD SWINTON.—“ I admit that a common agent may bid at a public roup ; but this was not a public roup, *quoad hoc*. He knew that Braidwood was not in the room, and should have stopt. That an agent may buy at a public roup, is not properly a rule, but an exception from a more general rule, that agents, trustees, &c., cannot acquire to himself the subject of the trust.”

LORD ESKGROVE.—“ I am of opinion the common agent cannot acquire for himself. Such is the law of England.”

LORD DUNSINNAN.—“ Of same opinion.”

LORD PRESIDENT.—“ I am for the first interlocutor.”

LORD HENDERLAND.—“ The Roman law has been misunderstood. I am for adhering.”

LORD ABERCROMBIE.—“ I am for the first interlocutor. Had the parties at the time called on Mr. Mackenzie, to say, whether he would agree to pay what others were ready to pay, namely, £13,000, or asked the estate to be re-exposed, the Court would have ordered him either to do the one or the other.”

“ Alter.—Repel reasons of reduction, and find Mr. Mackenzie entitled to the expenses of proof.”

Vide President Campbell's Session Papers, Vol. 69.

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“ consequence of letting trustees have the lease on a refusal to renew to *cestui que trust*.” And Lord Chancellor Hardwicke, in *Welpdale and Cookson*, in 1747, says, “ He would not allow it to stand good, although another person, being the best bidder, bought it for him at a public sale. I know the dangerous consequence ; nor is it enough for the trustee to say, you cannot prove any fraud, as it is in his own power to conceal it.”

The common agent in a judicial sale is an office of trust in the strictest sense of that term. His office is derived partly from the creditors who elect him, and partly from the Court, who confirm by an act of Court, his election ; and he is responsible for the faithful discharge of his duties both to the one and to the other ; and, consequently, falls within the rule of those cases. The same principle was recognized in the Roman law ; and the law of Scotland stands on the same footing in regard to the acts of tutors, guardians, factors, and trustees, offices all of them of the same character with that of a common agent.

Pleaded for the Respondent.—The respondent's decree of sale, by which he possesses the estate in question, and which declares that the sale had been legally and orderly proceeded in, and adjudging him to be the purchaser, ought to be a sufficient bar to this action. This express declaration of the decree is not words of mere style, but a judgment pronounced on facts, stated to the whole Court, by one of their own number, appointed to witness and direct the proceedings. As matter of concluded record, it ought therefore not to be allowed to be redargued even if that, in point of fact, were possible, by lesser or parole testimony, as both incompetent and dangerous. In the law of Scotland, a decree of sale has hitherto been deemed the strongest and best title to land that could be adduced. No person thinks of inquiring further. “ If all parties are cited, it is an absolute and sovereign security.” The regularity of the proceedings are not impeached ; and if, in these circumstances, the present sale was set aside, the land rights of Scotland would be entirely shaken. The declaration of the Court, as judge of the sale, that the common agent was the purchaser, and the adjudication of the estate to him as the highest bidder, implied that he was competent to bid, and of consequence to purchase. He did this in presence of the Court, and in presence of the appellants. If he then did a thing which was in itself either illegal or improper, why did

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the Court *pars judicis*, or the appellants, not object. It is obvious that the Court would never have permitted its officer to do a thing which by law was considered illegal. They would never have awarded the estate to belong to him and his heirs for ever. Yet, nevertheless, it is maintained that this decree of sale is null and void. But the ground upon which this is rested, the respondent humbly apprehends to be perfectly unmaintainable; because the respondent's holding the office of common agent inferred no incapacity to become purchaser. Such rule of disqualification is established by no statute, and by no act of Sederunt, or other regulation of Court. The office has been known since 1756, when it was first instituted, but no doubt was ever entertained until the present question that a common agent might buy the estate so circumstanced; and where there has been a general opinion of this held, and the practice in conformity with that general opinion, and where the party has acted *optima fide*, the *past* acts of the Court ought to remain undisturbed, leaving the legislature to do as to the *future*, whatever expediency may dictate. It would be plainly wrong to make out a case here from the law of England; yet it is from analogy alone that the appellants hope to succeed in the present case; but the English cases cited regard trusts, where the disqualification rests on the maxim, that one cannot be *auctor in rem suam*. In such cases, the trust is private, the act private, and hence the necessity of fencing the office with such safeguards; but here the office is a public judicial office, every act and step is public and judicial, patent to all, to be scrutinized by every one who had a mind. The English cases therefore do not apply, or bear out the doctrine, that the common agent is not *eo nomine* disqualified. Looking, therefore, to the fairness of the transaction, to the absence of all fraudulent design, of which the Court unanimously acquitted him, to the appellants' own conduct in standing by, looking on and permitting him to buy the estate, without ever hinting disapprobation or dissent, and thereby confirming and homologating the sale; and, finally, looking to the time he has been allowed quietly to possess on the decree of sale, the same ought completely and absolutely to bar any further question.

After hearing counsel sixteen days in this case,

LORD THURLOW said :

MY LORDS,

"The proceedings in this cause, both in the Court below and here, have drawn to a great length. That is not won-

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erful, considering that the reputation of the respondent had been supposed to be involved, and the largeness of the property at stake. It would be impossible for me, were I inclined, to pursue the argument in all its points, or the evidence in all its bearings, with the precision it would require.

“ My Lords,—The subject, if I understand it, depends on two single points: The first is, That a period of eleven years elapsed since the cause of action arose—*that* circumstance raised a strong prejudice in my mind. The second is, The circumstance of an action having been brought in 1784, in the manner in which it was, seemed to deserve a considerable degree of reprehension, and also, had a considerable effect upon my mind; but it is absolutely necessary, in considering such topics as these, to apply them to some conclusion, and to examine with some accuracy, in what manner they support them. It is said, the length of time that has elapsed ought to entitle the respondent to a decree, exclusive of anything else, because he is not answerable for the length of time which has taken place, and is entitled to all the advantages possible to be derived on his part, in respect of the uncertainty of the evidence. Whatever evidence remains doubtful, the balance of the scale ought to go in favour of the respondent. I will go one step farther, to say, if any ground could be made of what they call homolagation, that the consent and acquiescence for that length of time, would have gone a great way towards substantiating that principle, only rendering void the transaction in one part; but, beyond that, it is impossible to apply the circumstance of length of time.

“ My Lords,—A great deal of reliance has been placed, and ought to be given, to the character of the respondent, which is said to be irreproachable, and which has not hitherto in point of fact been impeached. So far as that circumstance goes, I am willing to admit it. I find it was considered in the former judgment, and was said by all the judges, that he was regarded as a man of character; but when that character comes to be applied to the present question, the mind of the respondent is an ingredient that seems to run from the beginning to the end of the business. It is said, the situation in which he stood, and the duty he owed to those who had an interest in the sale, put him under no circumstances peculiar or distinct from those which a mere stranger would have stood in, and that he thought himself at liberty to take any species of advantage, and carry them to every extent a stranger might have done; but, in the construction of law, the very circumstance of being regarded in that point of view, appears to have misled him to take such advantages, which, even in the case of a stranger, would have been regarded as sharp, and which in the case of a common agent, the general principles of law will not allow.

“ My Lords,—Another difficulty arose, in which both parties seem to have taken lines so exceedingly opposite, that when one comes

to consider the opinion of the judges, it is impossible they should meet in any one point. On the one side, it was supposed the circumstance of being common agent created some legal disability in him to enter into the purchase at all, that, therefore, it was unlawful, and must be cut down. On the other side, they seem to imagine, if they could dispose of that, and if they could prove there was no rule of law, which made a contract so entered into unlawful, they had broke up the whole question made on the other side. In consequence of this, both sides considered, and laboured a great deal to prove whether he was or was not a trustee.

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“ My Lords,—It is undoubtedly clear that no man can be trustee for another, but by contract; but it is equally clear, that under circumstances, a man may be liable to all the consequences in his own person which a trustee would become liable to by contract. But the ground upon which this is rested, is stated in a very few words, and lies in a very small compass. The contract of sale, according to all the *forms* of it, was a valid and good one, and the estate was by that means vested in Mr. Mackenzie. The York Buildings Company, being the party interested in the subject, without disputing the effect of the law, say, whatever the law may be, yet, from the manner in which this estate was purchased, and under the circumstances of the case, in point of equity, he ought to be compelled to do that which is right upon the subject. In order to affect him with a plea of equity upon this, they state that he was the common agent for the sale of that estate.

A great deal of argument was used on one side and the other, as to the depositions of the witnesses, and as to the situation he was stated to have filled. But upon the results, if one were to go no farther than the history of the cause, it is exceedingly manifest that the common agent did take upon himself the employment of carrying on the sale to the utmost advantage for the benefit of the creditors, and also for the benefit of a reversion for those who were entitled to it. All the gentlemen seem to admit that this was his duty, and taking it to be so, one side said, *That* being your situation, it is utterly impossible for you to maintain (perform?) that duty in such a manner as to derive an advantage to yourself. This seems to be a principle so exceedingly plain, that it is in its own nature indisputable, for there can be no confidence placed, unless men will do the duty they owe to their constituents, or be considered to be faithfully executing it, if you apply a contrary rule. The common agent has, in point of fact, gained an advantage by it. I take it to be sufficient to support this ground of equity, that he had such a duty, and that, in the execution of it, he did gain an advantage, and that advantage he so gained, was to the prejudice of those in whose behalf he should have been executing his duty. It seems to be enough to prove, in point of conscience, he ought to be compelled to set that matter right.

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"Now, my Lords, supposing the equity to stand in the way, there is also another principle of equity which seems not to have been taken into consideration by the Court, and has not been provided for by any of the decrees in dispute, because it was reversed in the Court below. I mean the second interlocutory judgment.

"My Lords,—The ground of equity I mean to state was this, that whoever comes into a Court of equity to ask for reparation for wrongs done, ought to come prepared to show the justice of his case. For it is impossible that any man can come into a Court of equity to rescind a contract, and at the same time desire to retain the price he paid for the contract, or desire to affect any person he has suffered to contract, under that colour or title; because, taking these grounds together, they appear to absolve the whole business. Certainly, this question does not depend merely upon the grounds of complaint that were made. I will reduce the complaints made to a very few heads, viz., That, in bringing this estate to sale, he did not bring it under the view of the Court or of the public in the best manner, for the purpose of obtaining the real value of the estate. The first article, and that which seems the easiest is, that which they call the grassums. The estates belonged to persons who forfeited them in 1715. They were bought by the York Buildings Company, but were managed in such a manner as to reduce the affairs of the Company. They had been so managed, that the old rents of the estate were reserved. Instead of increasing the rents, they thought proper to take their profits by means of grassums, and by this means it was a year's rent upon sixteen years' lease, and half a year's rent on eight years' lease. The consequence therefore was, that the upset price was about two-and-twenty years' purchase, instead of twenty-five. There were some articles, timber and other things, which are not of great consequence to the decision of the cause. The counsel for the respondent took pains to persuade your Lordships he had calculated them in much the same manner in which they had been calculated before, and he insists, if any dilapidation had been suffered, it must have been done accidentally, and he offered to prove, that at that time Mr. Mackenzie appeared to have had no intention of purchasing the estate. My answer is, supposing the fact to be, that the dilapidation was accidental with respect to the party, the advantage gained by it was not accidental with respect to him. Supposing it to have been made purposely, a common agent being bound to make the utmost of the estate, cannot derive to himself an advantage to the prejudice of his employers, so that objection would not be removed; but when one comes to observe, on the part of a common agent, who has taken such an advantage as this, as far as this goes, it ought to be carried against the common agent, considering the situation in which he was placed. I know, in some cases, the reports have gone so far as to say, that where distinct evidence was given to prove that a trustee or an executor took an advantage in an

article where it would have been impossible to have procured the same advantage for the ward, that even *that* was set aside ; but I am not prepared to say, that a case might not by possibility exist, where no advantage of that sort had been taken, but I am content to go the whole length my Lord Hardwicke went, upon similar occasions, to say, you must, in determining upon this, not only consider the points I have mentioned before, but consider the reason which a man in that situation has, not only to commit the fraud, but to conceal it. Therefore, it stands upon no other ground than this, that an advantage has been taken, which the confidence of the agent ought to have prevented ; and it does not appear to stand quite in so fair a light, or to be capable of the alleviation or colour that was attempted to be put upon it on the other side. Perhaps it is true, that four or five, or any number of strangers, may combine to bid for the estate by one voice, under an agreement, that if they do not bid against each other, they will divide the profits among themselves ; and it would be extremely difficult, if not impossible, to find any sort of equity that would overturn a public and judicial sale upon that species of transaction ; but I take it to be abundantly clear, that a common agent (who had made himself, from the duty of his office, perfectly master of the estate,) entering into such a bargain as that, must be deemed to have behaved iniquitously. I admit, that according to the fashion of thinking in that country, a common agent is not thought to deal sharply with an estate under such circumstances. Let that stand as an excuse for him, and prevent obloquy ; but it is impossible to adopt *that* in a court of justice. It is not only violating a duty, but it is a corrupt violation of it ; for he has kept back purchasers that would have been bidders against him. That was really a violation of his duty, with respect to the two articles that were here bought by him.

“ I own, it appears to me, the case has been much too strongly made out against him in that way. It is said, the appellants cannot be suffered, at the distance of eleven years, to plead the incompetency of the respondent. I say, the effect of the distance of eleven years before the suit arose entitled him to no advantage. Where there is a disputable point, a person under such circumstances would be entitled to the advantage of it ; but there is no such point here, because all the evidence, both his own, as well as the other, is against him. Much pains were taken to discolour the evidence of Mr. Braidwood, teacher of languages. They said there were some articles in which he was contradicted. That, I confess, raised a doubt concerning his accuracy in point of memory, but there is no difference between his evidence and the rest, because, when he speaks of the conversation with Mr. Mackenzie, there can be no doubt the conversation must have passed exactly in the way he represents it. The counsel for the pursuers endeavoured to prove that Mr. Mackenzie fixed the hour of five for the sale to begin, with a view to prevent him coming earlier. That is

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overcharged; for the evidence of Braidwood does not go to affect him quite so deeply as that. He says, he inquired of him when it would begin. The judges were perfectly acquainted in point of practice that the sales very seldom begin so early as given out at the bar. That the advertisement was published two days before, but does not point out sufficiently that the sale was to begin with more punctuality than sales usually did. Mr. Mackenzie told him it would begin at five o'clock, but he had better go to the office to inquire there, where he might look over the papers, and form a judgment at what time it was likely to begin. This was a sort of language which it would have been fair enough to hold. But another thing decisive, is his own evidence and that of Mr. Taylor; for when the sale came on, he asked Mr. Taylor if Mr. Braidwood was in the room. That strengthens the evidence of Mr. Braidwood a great deal more than all the circumstances together. He asked whether he was in the room, and, upon finding he was not, he went on as stated in the evidence, with such precipitation, that Mr. Taylor remonstrated with him that he was going on too fast, and desired him to call the macer and prevent him from knocking down the bargain so soon. He said, "You may go round and tell him yourself," which was a very awkward circumstance; for while Mr. Taylor was going round to tell the macer he was acting with precipitation, that lot was knocked down to Mr. Mackenzie, and he chose to take it. His obvious duty was to keep the sale open, and to do for another the very thing he would have done for himself. If he had been selling his own estate, with the expectation of a purchaser's coming, he would have put off, or continued the auction longer. He ought to have done the same thing here that he would have done for himself, and it seems apparent he did not do it.

"My Lords,—It is said you shall not quarrel with the rules of the Court. The rule is, the proceedings are to be read, and a glass was to run for half-an-hour. It is clear that these two lots were sold before five o'clock, and consequently there must have been a precipitancy contrary to that which the universal rule of the Court held out. It is said you shall not quarrel with the rules of the Court. I say so too. If it was in the case of a stranger, he would not be answerable for the Court having proceeded in this manner; but an agent cannot take advantage of the Court not having proceeded regularly. It seems to be extremely clear, that he has made himself liable to all that which I stated at the outset.

"As to the Company having consented, it seems to be a matter of doubt in what manner it was possible for them to proceed in order to obtain justice. It is, therefore, not much to be wondered at, that the York Buildings Company, when they were deprived of the possession of their own estates, were not able to bring the suit forward, in order to elide the homologation such as will bind the parties. I apprehend it will be sufficient to show, that being ap-

prized it was in their power to set aside the sale, they did some act by which they gave an express preference to the sale standing as it does, instead of seeking to have it rescinded; but there is nothing in the cause from the beginning to the end, that will go to that point. It was argued, and I think pretty strongly, that the forms of the proceedings were not such as enables the pursuer to obtain that justice he is seeking, because anything short of that, not being contained in the summons, ought not to be referred to. I do not at all wonder it was not heard of, because nobody could have attended to the progress of the causes, from that country to this, without observing that correctness in general, with respect to any forms of pleadings, does not make a part of their proceedings; but it is thought if the objection had been made below, in order to listen to an objection in point of form, it would be a sufficient answer. If this sale is to be set aside, the circumstance of its being challenged on certain general terms, will not make the application bad or informal, because the pursuer is desirous to have it set aside without specifying the terms upon which justice will oblige him, the defender, to set it aside. It appears to be necessary, that Mr. Mackenzie, having advanced money for the original purchase, and money for improvements, should be reimbursed. It is clear that the lessees, who may have contracted for leases, while the other party suffered his legal title to remain unimpeached, ought not to have their leases challenged, though it might be rather difficult, if this matter was set aside absolutely, to prevent those leases from taking the same consequence. It will be necessary, if the situation of the Company requires it, that the sale should be put up again. If it was to be put up again, it is clear some of these contracts could be preserved no longer. In order, therefore, to preserve all possible claim, it has occurred to me to submit, that the clearest way of doing justice, is that upon which I shall call for the opinion of your Lordships.

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“ I submit that the proper method will be to set aside the sale in an equitable point of view, but to do it by compelling a conveyance of the estate, subject to all the terms I have stated. If that should be your Lordships' opinion, I propose to reverse the interlocutor, and that the sale complained of should be set aside.”

LORD CHANCELLOR LOUGHBOROUGH.—“ My Lords,—I shall submit to your Lordships some observations upon the discussion of this case.

“ My Lords,—I must confess, when the case was opened at your Lordships' bar, I felt my mind impressed with several prejudices against the present appeal. The length of time from the sale to the commencement of the present action, had its weight. Another circumstance was, the summons, in the year 1784, was manifestly not proceeded with as any judicial proceeding ought to be; and the enormous length of the arguments stated in the case on the part of the appellants, contributed to raise an idea concurring with the for-

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mal judgment of the Court of Session, and the expression of satisfaction they made as to the character of Mr. Mackenzie, and that this was an unfavourable case, stirred up in the hope of gaining an advantage, which if it existed, ought not to weigh at all in accelerating or forwarding the claim of the appellants, namely, the advantage which resulted from the different value of lands in the year 1784 in Scotland, and the value which land bore at the time of the sale.

“ My Lords,—Notwithstanding all these unfavourable impressions, I felt it my duty to examine particularly into the case, and I see the Court of Session pronounced two judgments opposite to one another, and yet, when I came to examine this case upon principles peculiar to this or that law, it does not depend upon the form in which any rights are disposed of, but upon grounds founded on general principle. I thought neither of the judgments at all applied to the justice of this case. The judgments under which the respondent remained in possession, namely, the first and third interlocutors, were clearly founded on an idea, that the respondent in this cause, in the situation in which he stood, was at liberty to make such a bargain as any stranger or indifferent person might have done with respect to the purchase of this estate. The intermediate interlocutor was founded upon an idea, that if any thing had not been reprehensible in his conduct, yet, being common agent to manage the sale of the estates, he was in a situation in point of law, incapable to become a purchaser, and that the purchase it was impossible to maintain as good, he being common agent. It appeared to me, therefore, that the judges of the Court of Session had been led to adopt two extreme grounds. Those who were of opinion against the respondent entertained this opinion, that, let his conduct be ever so correct, the quality of common agent, barred his exercising any right as a purchaser, and that all he contracted for as a purchaser, it was argued at the bar, was a simple nullity, and that it was no good sale. On the other hand, when *that* had been pressed, those who maintained that such restriction did not attach upon a common agent, seemed to have thought there was no middle course, and if he was not disabled absolutely in point of law from purchasing, he must stand in the position of all the rest of mankind, and might purchase as advantageously as he could, provided there was no gross practice or direct fraud. Neither of these opinions are at all in my opinion proved. A person who is an agent for another, undertakes a duty in which there is confidence reposed. He undertakes a duty which he is bound to execute to the utmost advantage of the person who employs him. An agent may be employed by any one or more persons, and such an agent may purchase. Brokers purchase every day, but they can take no advantage by it. The bargain must be perfectly fair and equal, at the best price, because they are placed in a situation in which they are bound, in the first instance, to act against their own advantage, and for the advantage of their employers; and

if they sacrifice that interest and advantage, with a view of profiting and taking the interest of it to themselves, the purchase will be liable to be set aside, the advantage will not come to themselves, and the breach of confidence will not avail them.

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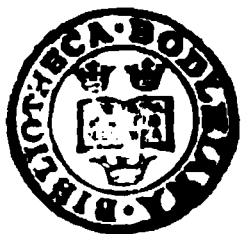
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“My Lords,—In considering the situation of a common agent, which was the situation in which Mr. Mackenzie stood, I am led to consider what peculiar advantages he had. It had been argued at the bar, that Mr. Mackenzie’s conduct in preparing the estates to be put up judicially, was perfectly regular, and according to the course and practice of similar proceedings, namely, judicial sales ; but I am apt to think otherwise. The judges have talked of his reputation in the office, and have expressed themselves with regard to his conduct. What is the conclusion ? It is, that he acted as common agent, by following the course of the Court, by pursuing the methods that had been practised, not deviating from the rule of conduct that all other persons would have observed. If, in consequence of that, a loss had arisen, they could not have charged him with negligence, because he had done that which the Court pointed out to be regular in the Court. I cannot help observing on the practice which has prevailed, with respect to judicial sales in the Court of Session, for it is manifest that a strict account of the value of these estates is not got in this case. If an estate is let upon the old rents, all the world know the old rents of the estate are not equal to the actual value of the estate. I do not say the rule of the Court, in not allowing anything but what is proved to be paid, is a bad rule for fixing the rental ; but if you do not set out at fixing the periods at which the rents were fixed, especially when advantage may be got upon the possession, it is clear you leave a great deal of the value behind ; and therefore I cannot help saying, if it is the general practice to take no account of the value, it is a very loose practice, and must be attended with great disadvantage to estates disposed of at a judicial sale. How could it then apply ? It by no means follows from thence, that there is no proof to be given of what the land in the neighbourhood does yield. It is in itself matter of proof for the Court to inquire into. What can the Court do ? The Court will do this,—it is a measure by which the Court will go on to tell the world the rent of the estate is more than is actually paid by the tenant. At any rate, *that* matter should enter into the inquiry of the Court, and they should examine the constituent parts that compose its value. That was not done in this instance, and there are several others which I do not go through. What is the consequence to Mr. Mackenzie, he being the common agent ? When the estate came to be put up to auction with such a rental, and such an upset price, Mr. Mackenzie knew the actual leases that existed, he knew their circumstances, which were but matters of speculation with other persons, but of all those he had an insight. To give your Lordships but one instance, I will mention the estate yielding £800 per an. that he bought. The estate had been in

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the possession of sub-tenants from the beginning of the century. The rent paid was the only rent stated to be paid by the rental. The leases were all expired. Mr. Mackenzie took grassums according to the rate of one year's purchase, for fifteen or sixteen years' lease, and half a year for seven or eight. What is the consequence of this? Mr. Mackenzie knew perfectly well the actual rent was £800. That the tenants, in fact, paid more, having paid a fine. A fine of one year for fifteen years, is exactly equal to 11 per cent. upon the rent. What was the case of Mr. Mackenzie? He takes it at a good value upon twenty-five years' purchase, upon the rental of £800. But to that you must add £99 more. The consequence of that is, that as for one part of the rent of the estate, Mr. Mackenzie has paid no value at all; and then in their argument they say:—"This is a fair purchase, for I have done what the Court of Session adjudged. I have paid a fair price upon twenty-five years' purchase of £800 per annum." On the other hand they say:—"You have taken an advantage arising from your knowledge of the subject. You have put money into your pocket by the sale; and you have not paid the price, which, by the tenor of your contract, you ought to have paid." I think Mr. Mackenzie is bound by duty, and that he could not take that advantage. The Court of Session has considered that he might act as any indifferent person. If he had been any man not engaged in that capacity, and had seen the estate put up, nothing could have been imputed to him. He had a right to avail himself of his judgment and understanding. He, bidding at a public sale, might have got the estate on the best terms he could; but it is not so with respect to Mr Mackenzie. With respect to the conducting of the sale upon Mr. Taylor's own account, there was hurry and precipitation on the part of Mr. Mackenzie, who should have kept open the sale. It would have been very well if he had been acting for himself, but being in his situation, and knowing there were bidders to come in, he would only have done his duty if he had stopped the sale. If an application had been made to the Judge, it would have been stopped, but it was not stopped, Mr. Mackenzie being the bidder, and present in the Court himself. Mr. Taylor tells you he was so concerned, he could not sleep all night; for he could see all things had not been rightly done. A common purchaser may snap and take advantage, and if it is not checked at the time, he shall have the advantage of his activity. With respect to Mr. Mackenzie, it is not possible for him to take that which no law would take from a sharp common purchaser. He is the agent, a man of business, paid for transacting his duty, and, we are to suppose, paid adequate to the performance of it; and it is totally impossible, according to every principle of general policy, and every ground of equity, to permit any advantage to be taken, though he was not the artificer of it, though he did not contrive it for himself, yet he is not to avail himself of that good fortune—it is his duty to

prevent it—he is bound to do it—he is paid to make the most advantage of the sale for the benefit of his employers.

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“ My Lords,—With respect to the acquiescence which has been stated, and which was so much relied upon, I think, if it is fairly stated, it comes to nothing ; for it would be a violation of justice to call it so in the circumstances of the case. You cannot impute any laches upon the part of the appellants. Mr. Mackenzie is stated and admitted to be the agent for the York Buildings Company, and for the creditors also ; he sold the estate for both ; therefore, as long as he continued the agent, as long as the management of the affairs were in his hands, and their funds passing through his hands, and as long as his accounts as agent were unsettled, the Company was not in a situation to call him to an account. If a gentleman has a transaction between an agent or steward, and finding himself deceived, continues to employ him for years, then he is not at liberty to call him to an account for his former conduct, but if he dismisses him after coming to a knowledge of his conduct, he may do it. If he is dismissed, and then lies by and suffers time to elapse, then the time will begin to run against him from that period ; but never can during the time he was an agent, and the management continued in him. The appellants could not call the respondent to an account. He was not an agent of the election of the York Buildings Company. He was an agent put upon them by the nomination of the Court of Session, and while he continued their agent, no delay can be imputed to them.

“ My Lords,—Upon these grounds, therefore, I am of opinion that the appellants have established their claim. I am greatly obliged to the noble and learned Lord who has digested this case. It would not have been well to have sent this case down again with general directions to proceed on it. The resolutions drawn up are perfectly accurate, and so very distinct and exact, though it is a bold thing to say there will be no farther litigation in consequence of the suit ; it has been very much investigated ; and I am not without hope it has been of service, as the whole matter will be determined by the present appeal.

It is ordered and adjudged that the interlocutors complained of in the appeal be reversed : And it is hereby declared, that the decret of sale, and the charter under the great seal, proceeding on the said decree of sale in favour of the defender, with the instrument of sasine in his favour following thereon, ought to be set aside and voided, to such extent and degree, and in manner hereafter provided, and the defender ought to refund to the pursuer all the rents and profits which he hath received out of the estate in question, and an

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adequate consideration for the enjoyment of such part thereof as he occupied himself: But without prejudice to the title of the defender to reclaim all such sums of money as he hath paid for the original price thereof, and also for the permanent improvement of the same, with the interest thereof, to be computed from the time when the same were advanced, and paid according to such rates as the Court of Session shall appoint; and likewise without prejudice to the titles and interests of the lessees and others, who may have contracted with the defender *bona fide*, and before the dependence of the present process; and also without prejudice to the title of the common creditors, to have the value of the estates in question, and the amount of the intermediate produce thereof applied in payment of their demands, the expenses incurred by the pursuer in recovering the same being first deducted. And it is further ordered, that an account be taken of the several sums of money which the defender hath actually paid as the original price of the said estates, and also of such further sums of money as he hath actually laid out for the benefit and improvement of the said estates, and that interest be computed at the above-mentioned rate, upon the said several sums, from the lands, when the same were actually disbursed, and that one of the said accounts be set against the other, and such rests made in taking the same, as justice may require; and that either party do pay to the other such sum of money as shall be found due on the balance of the accounts, if nothing be due to the defender, or upon payment of what shall be so found due, that the defender do re-convey the said estates to the pursuers, subject to the demands of their creditors, and to the leases and other contracts as aforesaid, in such manner as the said Court shall think fit to direct; and it is also further ordered, that the cause be remitted back to the Court of Session, and that the said Court do give all necessary and proper directions for carrying this judgment into execution.

For Appellants, *R. Dundas, Jas. Mansfield, R. M'Intosh.*
For Respondents, *Sir J. Scott, Robert Blair, W. Grant,*
W. Miller, W. Adam.

JOHN JAMIESON, Sheriff Clerk of Alloa,
STEVEN MAXWELL, Merchant in Glas-
gow, and JOHN HAIG, Distiller in
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JOHN RUSSEL, W.S., and JOHN SAW-
YERS of Bell's Mills, (Water of Leith), } *Respondents.*

House of Lords, 18th April 1792.*

USE OF A STREAM OR BURN—NUISANCE—SERVITUDE.—The Loch-
rin burn, which receives the common sewers of part of the city of
Edinburgh, and then discharges itself into the Water of Leith,
had been used at one time by the respondents, as it passed their
property, as pure water for dressing victuals, watering cattle,
cleansing and rinsing linen, and other purposes; but after the
erection of the Lochrin distillery, it was stated, that the said
burn and the said Water of Leith, had become so polluted as to
be unfit for any use, by the dregs, refuse, or other poisonous
matter thrown into the burn from the distillery, and that the
effluvia arising from it was most nauseous and unwholesome.
A proof in a declarator and interdict was allowed, which was
conflicting; but the respondents admitted that the common
sewers of certain parts of the city flowed into the Lochrin burn,
and this by prescriptive right. Held, in the Court of Session,
that the appellants, by the operations in their distillery, had no
right to throw their dregs or refuse of the distillery into the
burn. In appeal to the House of Lords, remit was made, to in-
quire how far the burn was liable to the servitude of a common
sewer, and how far the actual use made of it by the distillery,
could, in that case, be impeached in law as a nuisance.

The common sewers from George's Square, and the diffe-
rent streets in that neighbourhood, namely, Nicolson Street,
Potterrow, and Sciennes, fall into the Meadow, which is
situated to the west and south-westward, and pass along
the main drain, which leads to Lochrin, where the con-
tents form a small rill, which runs from thence in a north-
westerly direction.

In addition to the contents of these common sewers and
ditches, the rill which thus passes Lochrin, thus receives
the foul water which falls from the washing ground of
Bruntisfield Links, that which is thrown into it by the
dyers, and other tradesmen and manufacturers, and that
which falls from all the cow-houses in the immediate neigh-

* Omitted at its proper date.

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bourhood, besides the discharge from the common sewers and gutters of the whole of that suburb.

This burn of Lochrin, as it has been called, might have been smelt at a great distance, and, as the city increased towards that quarter, its volume became larger, and the effluvia greater.

Such was the account of it given by the appellants, but a different history of this burn is set forth in the respondents' action.

About twenty years before this action was raised, *Lochrin* belonged in property to Alexander Ponton, architect, who had resided there several years, and left it on account of the nauseous smell which at all times, particularly in summer, this rill of putrid water sent forth. He sold it in the year 1772, to Alexander Reid, who converted the place, which was formerly a brewery, into a distillery, and carried on the business of a distiller there, without interruption. In the year 1784, the ground and distillery were purchased by the appellant, Mr. Haig, who carried on the same business without interruption, having previously erected additional buildings and machinery, until the present action was raised. The property then came into the hands of the other appellants, Mr. Haig's trustees.

Conceiving that the water of the said burn was polluted, by the operations of Mr. Haig in working his distillery, from alleged poisonous matter thrown into it from the distillery, the respondents brought a declarator and interdict. The summons set forth: "That the burn (rivulet) called Lochrin, when it comes out at the west end of the meadow, commonly called Hope's Park, and which afterwards passes under the name of Cross Burn, runs through part of the said lands belonging to the pursuer, John Russel, and in the course thereof, waters four several enclosures belonging to him, and falls into the said Water of Leith, a little above Coltbridge. That John Sawyers is proprietor of the lands of Bell's Mills, situated upon the river or Water of Leith. That the said pursuers, their authors, or tenants, have been in the immemorial right and possession of the water of the said burn and river, and in the practice of using the same for the purpose of dressing victuals, washing and bleaching clothes, watering their cattle, and other domestic uses; and which, till within these few years past, was *good and wholesome water*; but, since the time the distillery at Lochrin, which is situated upon the bank of the said burn, came to be the property of, or pos-

“ sessed by John Haig, distiller, owing to the operations of
 “ the said John Haig, and his conveying by some means or
 “ other, the dregs, refuse, filth, or other nauseous sub-
 “ stances, issuing or arising from the said distillery, into the
 “ said burn, the water both of the said burn and river, has
 “ become putrid, unclean, and unfit for the use either of man
 “ or beast.” And concluding to have it decerned and de-
 clared, “ That the said pursuers (respondents) and tenants
 “ had, and have good and undoubted right to possess and use
 “ the water in the said burn and river respectively, for
 “ watering their cattle, washing and cleansing clothes, and
 “ other family uses as formerly. and to have it declared,
 “ that by the operations of Mr. Haig, the water both in the
 “ Lochrin burn and river of Leith, has become, and is now
 “ polluted, as to render the same useless. That they ought
 “ not so to be molested in their possession, nor Mr. Haig
 “ any right to make the water useless, in the manner set
 “ forth; and further, that he ought to be interdicted
 “ from putting any of the refuse or other materials into the
 “ burn or river, and from polluting and poisoning the water
 “ thereof, in all time coming.”

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No averment was made in the summons as to prohibiting Mr. Haig from conveying into the burn or river, simple water, either from his distillery, or the fire or steam engine, by which he raised pure water from a well for his manufacture, and, in point of fact, the appellants contended that they issued nothing from their distillery into the Lochrin burn but plain, unmixed, or undiluted water. Nor was it alleged that the distillery itself was a nuisance, or had become so by its operations. Other actions were brought, one by the proprietors of the Canon Mills, and another by certain washerwomen on the River of Leith, and were conjoined. The Lord Ordinary allowed a proof before answer, reserving all questions as to the relevancy of the averments.

The proof led seemed to be conflicting. On the one hand, many witnesses declared, that, previous to Mr. Haig working the distillery, the burn had always a nauseous smell, and indeed, previous to any distillery being erected, that the water was both so foul and thick, as to prevent a neighbouring gardener from watering his plants in the nursery with it. That this burn issued from the ditches in the Meadows, or Hope Park, and that the common sewers and gutters from the houses in George Square, Nicolson Street, Potterrow and Sciennes, &c., emptied themselves into it. That

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a chemist had been ordered to examine the water, both above and below the distillery, who, having analyzed samples of the water before it reached the distillery, and also a sample after it passed the distillery, declared that both had the same smell, like putrid, or ditch water. The water in both samples contained but a very small quantity of vitriolic acid, and not so much as ordinary hard water. That they contained no poisonous quality, but were very offensive both in taste and smell.

Some of the witnesses, on the other hand, declared that the water at the distillery was so bad, that no use could be made of it there. That long before the distillery's operations, the water of the burn was perfectly pure and *wholesome*, and that their families had used it for dressing victuals. Some had watered their cattle, and others had used it for bleaching and rinsing their linen. Thereafter it became polluted, and was unfit for any use, having a nauseous smell, and being putrid. The appellants, willing to conceal nothing, stated further, that the washes or low wines which have been got by the process of distillation, are distilled a second time, and produce the spirits of the second extraction, and when no more spirit arises from the still, the *residuum* being pure transparent water, is thrown out. With this residuum nothing could be mixed, everything being extracted before being thrown out into the burn.

Dec. 7, 1789. The Court pronounced this interlocutor: "In the process respecting the distillery at Lochrin, in which Messrs. Russel and Saywers are pursuers, repel the defence, find the defenders (appellants) are not entitled to convey the water from their fire engine and distillery, or to throw the dregs, refuse, or materials of their manufacture into the burn called Lochrin, or Cross Burn, discharge and interdict them from so doing in all time coming, and decern and declare accordingly; and, in the other process respecting the distillery at Canonmills, in respect that the pursuers do not appear, dismiss the said process."

The appellants presented a petition to the Court against this interlocutor. In the answers to this petition, the respondents maintained, that no person is entitled, in carrying on a manufactory, to convert it into a nuisance, by corrupting and rendering unfit for man or beast a perennial rivulet, or stream of water, running through another's grounds. The appellants, on the other hand, contended, that so far from the distillery being the cause of this alleged nuisance,

they offered to prove, that at the period when the distillery ceased to be worked, the water of this burn, from the place where it passed through Lochrin, till it fell into the Water of Leith, was in its whole course, so black, putrid, and nauseous, as to be utterly unfit for the use of man or beast, or for any domestic purpose whatever. But the Court adhered to the former interlocutor. Two other petitions were presented, but the Lords refused the prayer of the same.

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Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The interlocutors pronounced are not warranted by the action, but depart from the pleadings and issue of fact, and evidence thereof, contained in the summons. The injury described in the summons is, “that owing to the operations of the said John Haig, and his conveying, by some means or other, the dregs, refuse, filth, or other nauseous substances, issuing or arising from the said distillery, into the said burn, the water, both of the said burn and river, has become putrid, unclean, and unfit for the use either of man or beast.” The grievance is not ascribed to John Haig *generally*; but the nature of his operations, and the *manner* in which they are said to produce the effect complained of, are specially described. He is charged with conveying *nauseous* dregs, refuse, or filth, into the said burn, although there is not a vestige of proof on this subject, and the summons concludes, that he should be discharged “from polluting and poisoning the water in all time coming, so as to render the same unfit for the pursuers’ use.” But the interlocutor complained of prohibits what is not within the scope of the summons, namely, conveying the water from their fire engine, or throwing their refuse, dregs, or other materials into the said burn, and therefore widely departs from the conclusions of the summons. Further, while it is apparent that the action is directed against the misuse to the burn by throwing into it poisonous dregs, refuse, and other materials, there is no question made or put into issue disputing the appellants’ right of conveying away simple water or innoxious matter into this burn. They offered to prove that the water and refuse which fell from their distillery into the burn had nothing nauseous or noxious in it; but this tender of proof was rejected. 2nd, Supposing the interlocutors fall under the subject matter of the action, yet there is no law to prevent any person from throwing water or other innoxious matter

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into a common stream of running water. It would be a law against nature and the existence of society if such existed ; for it is by means of running waters that substances are carried off which would otherwise corrupt and taint the atmosphere. The exercise of this natural right, common to all, can only amount to an injury, when so great a quantity of matter is thrown into the stream as to divert its course or overflow its banks, or when the matter or substances so thrown into it are of a poisonous or pernicious quality. And if this be the law with respect to clear running water, it must *a fortiori* be the law as to the dirty burn now in question. 3d, But the appellants have only continued a manufactory that has existed for many years before the appellant, Haig, acquired it, only on a greater scale.

Stair, B. ii.
 tit. 7, § 11.
 Dict. vol. iii.
 p. 350.

Pleaded by the Respondents.—1. It is a general rule of law, that a person whose property lies on the banks of a perennial stream, cannot appropriate it entirely to himself. He may use it for all domestic purposes, and may apply it to artificial purposes, such as driving wheels employed in manufactures. But he must allow it to descend in the usual channel, and in such state as to enable those whose property is in lower situations to make every lawful use of it. Many authorities might, if necessary, be quoted in support of this doctrine, which is founded not on the municipal law only, but on natural justice and reason. And if the superior heritor cannot deprive the inferior of the benefit of the stream of water by diverting its course, as little can he be permitted to do so by corrupting it to such degree as renders it unfit to serve the primary uses of water. 2. The evidence in this cause establishes, beyond a doubt, that the stream, called Lochrin, was formerly pure in its course through the respondents' grounds, and that it was used for watering cattle, and all domestic purposes; that it became contaminated and unfit for use by the operations at the appellants' distillery; and that these operations were the sole cause of its becoming unserviceable; because, when they were stopped for a time, the water became pure as before. It is also established, that these operations not only rendered the water unfit for use, but highly offensive to the smell, and consequently prejudicial to the health of those who live near it. The respondents are therefore entitled to a decree confirming them in their former innocent right to the use of the water, and to the removal of a recent nuisance. 3. Nor can the respondents admit that the cause

of this burn being polluted, is to be ascribed solely to its being a common receptacle of the common sewers of a part of the city of Edinburgh ; because it is proved by the evidence, that the rivulet has other sources, and that the water was pure and fit for use when it reached the respondents' grounds, and would be so at this moment, notwithstanding the drain from the city, were it not for the appellants' works. If the drain from the city of Edinburgh were to render the water unwholesome, or unfit for use, the respondents behoved no doubt to submit to it, because it is necessary, and the citizens have a right by prescription ; but that is no reason why the appellants should be permitted to increase that mischief to the injury of the respondents.

After hearing counsel, it was

Ordered and adjudged, That the cause be remitted back to the Court of Session, in Scotland, in order that the said Court may inquire how far the rill, called Lochrin burn, or Cross burn, is liable to the service of a common sewer, and to receive the offscourings of houses and other trades, and in what parts built and established, or hereafter to be built or established, and to what extent : Also, how far the actual use made of the distillery in question can be impeached in law as a nuisance of a rill so circumstanced, and by what means, in particular, within the description of the libel, such annoyance is occasioned, and how far the same affects the parks of Mr. Russell, the pursuer (respondent) in the said libel mentioned."

For Appellants,—*W. Adam, Thomas M'Donald.*

For Respondents,—*W. Grant, J. Austruther.*

NOTE.—The judgment of the House of Lords seems to have been decisive of the question, as no further steps appear to have been taken in the case under the remit.

JOHN PETER DU ROVERAY and Others, Creditors of MACKENZIE of Redcastle, } *Appellants.*

JOHN MACKENZIE and Others, Creditors on said Estate, } *Respondents.*

House of Lords, 1st June 1795.

ADJUDICATION—INTIMATION—PROVISION—JUS CREDITI.—If intimation be given in the first effectual adjudication in order that cre-

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ditors may be conjoined, it is not an objection to any posterior adjudications, (so as to disappoint them of their proper place in the ranking), that no intimation in terms of the statute was given, the want of such intimation not being a nullity.—By an antenuptial contract, it was provided that the children's provisions should be payable to them at the father's death, and "to bear interest from the majority or marriage of the said children:" Held, in respect the father was bound to pay interest upon the sums so provided, from the time of the children's marriage or majority, that they had a *jus crediti*, and might have used diligence in their father's lifetime.

In the ranking and sale of the estate of Mackenzie of Redcastle, several objections arose to the claims of the creditors claiming to be ranked preferably on the estate. Two classes of heritable debts appeared. Those constituted by heritable bond and infeftment, which were classed first; and those constituted by adjudication, which were ranked in the second place.

Of the latter class, the first effectual adjudication was obtained by George Gillanders of Highfield on June 18, 1788, after which, there followed a variety of other adjudications at the instance of different creditors, all led within year and day, in terms of the act 1661, c. 62, and were ranked *pari passu*, so as to draw equally in proportion to their respective debts. And, in the third place, were ranked those adjudications led beyond the year and day, creditors who, in this case, had very small prospect of getting anything.

23 Geo. III.
 c. 18, § 5.

Among these was the claim of Peter du Roveray, the appellant, who stated an objection to all the adjudications that were ranked preferably to him, founded on the following enactment regarding adjudications: "That, in order to lessen the number
 " of adjudications, and, consequently, the expense upon a bankrupt estate, the Lord Ordinary officiating in the Court of
 " Session, before whom any process of adjudication is called,
 " shall ordain intimation thereof to be made in the minute-
 " book and on the walls, in order that any other creditors of
 " the common debtor, who may think proper to adjudge his
 " estate, and are in readiness for it, may produce the in-
 " structions of their debts, and be conjoined in the decree of
 " adjudication; and a reasonable time, not exceeding twenty
 " sederunt days, shall be given for that purpose, unless
 " there be any hazard from a delay, which the Court and
 " the Lord Ordinary shall judge of."

In Gillanders' adjudication, being the first effectual one,

intimation was given, and several creditors appeared, and were conjoined with him, but in all the other adjudications, which had been ranked by the common agent, prior to the appellant, Mr. Du Roveray, this requisite form had been neglected, and he therefore contended, 1st, That in place of being entitled to a preference, they were absolutely void and null. 2. Even if not null, they could only be sustained as regarded the debt of that creditor who had raised a summons of adjudication, not as to the debt of those who had been conjoined without raising any such summons of adjudication; and, 3. That, at any rate, the appellant, who was in readiness to have been conjoined in the adjudications preferred, ought to be ranked *pari passu* with those adjudgers, with whose adjudications he might and would have been conjoined, if legal intimation had been given.

The Lord Ordinary ordered memorials, and reported to the Court. The Court, of this date, repelled the objections to the adjudication of John Mackenzie and others. On reclaiming petition, the Court adhered. *

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DU ROVERAY,
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v.
MACKENZIE,
&c.

Dec. 21, 1792.

Mar. 5, —

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—“This is a question concerning the intimation of adjudications.

“The clause in the act authorizing intimation is loosely worded, and must be construed in a rational manner, so as to answer the end and object which was in view. 1st, We must inquire whether it was meant that the intimation should be an indispensable requisite in every adjudication. 2nd, Supposing it to apply to all (adjudications), what ought to be the consequence of omissions ?

“As to the first, the act (23 Geo. III. c. 18, § 5), itself says not, and leaves a good deal to the discretion of the Judge. It is a strong measure to stop the course of legal diligence, even for a day, or for an hour. The rule is *jura vigilantibus*. (*vigilantibus non dormientibus, jura subveniunt ?*) But, says the act, let other creditors who are ready be admitted, if this can be done without prejudice to you, the adjudger. The only thing meant is to save expense, and to abridge legal proceedings ; and, in the case of the first adjudger, this may always be done with safety ; for it is clear that he can suffer nothing by the delay of twenty days. In the case of subsequent adjudgers, this is not so clear. There may be some hazard, more or less. The Judge therefore has, for the most part, been in use to dispense with the intimation in that case, and the act gives him a power of so doing. The minute-book, though in general a necessary form, is often dispensed with. If there be any thing ambiguous in the words, the prac-

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 ———
 DUNROVERAY,
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 MACKENZIE,
 &c.

Against these interlocutors the present appeal was brought.
Pleaded for the Appellant.—The act is explicit in declaring that every adjudication for debt, without distinguishing between first and second adjudications, requires intimation ;

tice of the Court ought to go some length in explaining them.—*Vide* the act of Sederunt about Sasines.

“2nd point. The Act neither says nor means that the regulation shall be enforced under the certification of nullity. The sole object of the law being to save expense, and to communicate the benefit of a certain legal diligence at the instance of one creditor to other creditors in a similar situation ; this object may be fully attained, and full justice may be done to all without annulling the diligence. This (annulling of the diligence) would be doing great injustice to the party, who, by the common rules of law, is the best entitled to the favour of law, as being the most vigilant. The law does not mean to do any injury to him, but to admit others, in certain circumstances, to participate in that benefit, as in the case of arrestments and poindings. If he has wrongfully omitted the necessary form of giving them notice to appear for their interests, this may bar him from any *plea* of *preference* in competition with them, or may entitle them to be put in the same situation as if notice had been given, but never can go farther.”

LORD CRAIG, PROBATIONER.—“I think the objection not good. The object of the law was to save the fund for division from unnecessary expense of leading separate diligence. After the first adjudication is led there is a prescription running, and therefore it is dangerous to delay.”

LORD JUSTICE CLERK.—“Of same opinion. There is *periculum in mora*.”

LORD SWINTON.—“I am for altering the interlocutor.”

LORD JUSTICE CLERK.—“I am for adhering. It was not intended to put negligent creditors on the same footing with vigilant. But the petition is well founded in second prayer.—(*Vide* Session Papers). If it be a good objection, the adjudication is a nullity.”

THE LORD PRESIDENT.—I am for adhering, except as to the third prayer, (*viz.*, ranking the objectors *pari passu* with those creditors with whom they would have been conjoined had intimation been given). ”

LORD JUSTICE CLERK.—“I am now for adhering *in toto*.”

LORD ESKGROVE.—“I am of the same opinion. As to the second prayer, (which prayed to annul the rights of such creditors as had been conjoined with the adjudication which had not been so intimated), as the Ordinary has a right to dispense with intimation, he has done so by admitting them creditors without intimation. The third prayer is without the act altogether. We cannot dispense with the law.”

Vide President Campbell's Session Papers, Vol. 69.

and the reason for appointing this intimation in second adjudications applies just as forcibly as to the first adjudication, the object of the statute being to put it in the power of creditors to obtain adjudications without the necessity of a previous summons of adjudication, but simply by producing the intimations of debt, conjoined with the first adjudication, when intimation was made to that effect. The statute expressly enjoins intimation as a means undoubtedly of attaining an end, but both the intimation, and the conjoining to which that intimation leads, are part and parcel of one end, namely, the saving expense in leading separate adjudications. And if the adjudications led, without any such intimation, were good at all, it could only be those creditors who had actually raised a summons of adjudication, and not as to those other creditors who had got themselves conjoined, without any such summons, and without any intimation. The adjudication, without intimation, may be good as to the debt, but invalid as in competition with other creditors. And as the appellant was in readiness to have been conjoined with such adjudications, had intimation been given, he is entitled to be ranked *pari passu* with them.

Pleaded for the Respondents.—That the intention of the statute was, 1. To save expense upon the bankrupt estate, by lessening as much as possible the number of separate summonses, and separate decreets of adjudication; and, 2. To introduce in favour of those creditors who were in readiness to adjudge, a privilege of being conjoined in the same decret of adjudication with the creditor whose summons had come into Court, instead of raising a separate summons, and going through the preliminary forms otherwise required. That the statute did not make this a statutory solemnity, essential to the validity of the adjudication, so much as it was a mere privilege allowed to those who might seek to be conjoined, and who were in readiness so to do. Intimation was not the end of the legislature, so much as it was a means of accomplishing the saving of expense, and thereby benefiting both debtor and creditor, which was the end in view. It was sufficient for this purpose that intimation was given in the first effectual adjudication, and that in practice this had hitherto been deemed sufficient, which practice further confirmed the meaning of the statute to be, that intimation in first adjudications was all that was necessary. But even supposing the statute had required intimation in all subsequent adjudications, it did not follow that the adjudication

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was in consequence void and null. Every thing done contrary to a statute is not necessarily null. Whenever the legislature intends this consequence to follow, it will say so, but, in the present case, nothing of the kind appears; and therefore there was no ground for maintaining that those creditors who had been conjoined in second and posterior adjudications *not intimated*, were not entitled to be ranked before the appellant, who has shown no evidence that he was in readiness to be conjoined at that date, and no evidence that his debt was then even constituted.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Rob. Dundas, Ro. Cullen, Geo. Daniells.*

For Respondents, *Sir John Scott, William Tait.*

Another objection stated by the appellants in the same case as the preceding, was, that the children of Captain Kenneth Mackenzie, the bankrupt owner of the estate, had been ranked as preferable creditors for a provision of £2000, which they were not entitled to be; because, according to the law of Scotland, children were not entitled to demand payment of their provisions, until all the deceased's onerous creditors were paid, and the question was, Were they creditors for their provision, and so entitled to rank *pari passu*, or to a preference for the same? This depended entirely upon whether they, by the nature of the provision secured, had conferred on them a *jus crediti*?

Their, father, by his antenuptial contract of marriage, bound himself "to make payment to the younger children, "to be procreated of the marriage, of the sum of £2000 "sterling, to be divided amongst them in manner as the said "Kenneth Mackenzie shall think fit, by a writing under his "hand; and failing such division, to be distributed among "them equally, *the said provision to be payable only at the "father's death, and to bear interest from the majority or marriage of the said children*, which ever of them shall first "happen, the said Kenneth Mackenzie and his foresaids being always obliged to give the children education and "aliment." Kenneth Mackenzie's father, Roderick, being then alive and in possession of the estate, was a party to his son's contract of marriage. The children, after their father's death, obtained decret of adjudication, and ranked both

for their provision and aliment, contending that they had a *jus crediti*, and were entitled to a preference as creditors, that the antenuptial contract was an onerous deed, that the wife's fortune was given as a consideration for securing these provisions to her children, and these being moderate and reasonable, no exception could be stated. That although no *solemnia verba* were necessary to constitute such *jus crediti*—a clear evidence of intention being sufficient, yet here, by the conception of the contract, the provisions were made proper debts. Answered: A man's children are his heirs after his death, but heirs of provision are postponed to the father's onerous creditors, which is the construction, when the father is simply bound to provide a certain sum. When the child is in existence, there is room for saying that something more than a *spes successionis* was meant; but, as a general rule, onerous debts must be preferable to a bond of provision not payable, as in this case, until the granter's death; at least, that a bond cannot compete with onerous debts, unless the father was solvent at the time of his death, which was not the case here.

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Of these dates, the Lord Justice Clerk, Ordinary, pro- June 7 & 9
nounced this interlocutor: "In respect that by the conception 1791.
"of the contract of marriage, the father was bound to pay
"interest upon the sums provided to the younger children
"of the marriage, from the time of their marriage or major-
"ity, though the payment of the principal sum was sus-
"pended till the death of the father: Finds it was com-
"petent to the younger children to use diligence in their
"father's lifetime; therefore repels the objection upon that
"head. Finds, that although the father was bound to ali-
"ment the younger children according to his circumstances,
"which would be implied, though not expressed, yet, in
"respect to the state of his affairs, the younger children Feb. 1, 1792.
"cannot compete with onerous creditors for aliment." On June 5, —
two reclaiming petitions the Court adhered.*

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—"The question is about a provi- June 5, 1792.
sion to children, and whether under it they had a *jus crediti*?

"There is no real difference, in my opinion, between this case and that of the creditors against the children of Dunardry, (Lachlan Mactavish), decided 15th Nov. 1787. (Mor. p. 12922). Attend to the words of the clause:—"And further, with respect to the children to be
"procreated of this present marriage, *other than the heir so succeeding.*

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&c.

Against these interlocutors the present appeal was brought as a part of the appeal in the previous case.

Pleaded for the Appellants.—Provisions to children payable after the death of the father, cannot compete with onerous creditors, and more especially a general provision to children, *nascituri*, in a contract of marriage. All that the children have during the father's life, is a mere right of succession, not a *jus crediti*. And to give them more in such circumstances, would be unjust to onerous creditors, and there is no decision nor authority in the law of Scotland, entitling children to compete with onerous creditors for their provisions, unless the provision, principal, and interest became due and payable, or might become due and payable during the father's life. And therefore, though provisions to children may be so constituted as to make them proper creditors, yet, as the marriage contract in question is not so conceived as to give the children such a *jus crediti*, the same cannot be sustained.

Pleaded for the Respondents.—It being admitted that provisions to children may be constituted in such a manner so as to make them creditors, or merely heirs of provision, the question is, Whether, by the conception of the contract, they have been made creditors in this case? As heirs of provision they could claim no right as creditors, such giving them only a *spes successionis*, leaving to the father the full right of administration, power to contract debt, and to spend his whole fortune, without they being able to interfere during his life; but the case is different when, by the marriage contract, they are made creditors to the father during his life, because, in that case, the children can take

“ *as aforesaid*, he, the said Kenneth Mackenzie binds himself to
“ make payment to the younger children to be procreated of the
“ marriage, of the sum of £2000 sterling, to be divided among them,
“ as he shall think fit; and failing such division, to be distributed
“ among them equally, the said provisions to be payable only at the
“ father's death, and to bear interest from the majority and marriage
“ of said children.

“ It could not be ascertained which of them were children, other than the heir, or how the division was to be, till the father's death. No claim could be made either for principal or interest during his life. If for interest, it was only in the way of aliment. I am against the interlocutor.”

Lord Monboddo, Lord Eskgrove, and the Lord Justice Clerk, for adhering.

steps to secure payment of what is due to them. To produce this effect, no precise form of words have been fixed, and, therefore, whether children have a *jus crediti*, or a mere *spes successionis*, is always a question of construction turning upon the intention of the contracting parties. If from the deed the intention was to confer a *jus crediti*, then this must rule, and the children are entitled to take steps during the father's life, and to rank as creditors on his estate, according to the priority of their diligence. No doubt the provisions here are made payable after the death of the father, but this is immaterial, because it is declared that they shall bear interest from majority or marriage, and whenever either of those events happen, the *provisions become due*, and both or one of these events might happen during the father's life.

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CREDITORS.

After hearing counsel, it was

Ordered that the interlocutors be affirmed.

For Appellant, *Ro. Dundas, Ro. Cullen, Geo. Daniell.*

For Respondent, *Sir John Scott, William Tait.*

WM. CHALMERS, Town-Clerk of Dundee,
JOHN PETER DU ROVERAY of London,
and Others, the postponed Creditors on
the Estate of Redcastle, } *Appellants;*

ALEX. ROSS and JOHN OGILVIE, for them-
selves and certain other Creditors of
RODERICK and KENNETH MACKENZIE of
Redcastle, whose debts were not in-
cluded in the Trust-Disposition; HEC-
TOR MACKENZIE, and BOYD and HAN-
NAH MACKENZIE, daughters of the said
KENNETH MACKENZIE; and JOHN MAC-
KENZIE, of the City of Edinburgh, for
self and on behoof of Others, the se-
cond and subsequent adjudging Credi-
tors of the said estate of Redcastle, } *Respondents.*

House of Lords, 1st June 1795.

REAL BURDEN, or PERSONAL RIGHT — TRUST-RIGHT.—A trust-deed was granted, conveying an estate, for certain uses, but without declaring these uses real burdens upon the estate. A list of the debts, and names of the creditors for payment of whose debts the

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trust-deed was granted, was made up and subscribed by the granters, with reference in the trust-deed to this list as relative thereto, and a direction that it should be inserted in the register of sasines, along with the infeftment to follow thereon, which was done accordingly: Held that these debts were not created real burdens on the estate.

Roderick Mackenzie, late of Redcastle, became a party to his son's antenuptial contract of marriage, whereby he disposed the estate of Redcastle to himself in liferent, and to his said son, Kenneth Mackenzie, and his heirs, in fee, securing at same time, by same deed, a jointure of £200 per annum to his wife, and granting to the younger children a provision of £2000.

Kenneth Mackenzie took infeftment upon the warrant for sasine, and thereby vested himself with the fee of the estate, subject to his father's liferent.

At the time of the marriage, Roderick Mackenzie was indebted in considerable sums, and for several years afterwards, both he and his son allowed the interest to run on unpaid, and they also contracted several additional debts, which rendered some arrangement of their affairs necessary. With this view they executed a trust-deed, empowering the trustees to levy the rents and proceeds of the estates, and apply them in payment of the interest due upon the debts, and the surplus divided betwixt the father and son; there was also a power in the trust-deed to sell, if necessary, for the payment of the debts of both the father and the son. A list of these debts was made up at the sametime, containing the names of the creditors, the amount of their debts, and a docquet signed *unico contextu* with the trust-deed, bearing a reference thereto; while the trust-deed contained a reference to this signed list, and appointed the same to be recorded in the register of sasines, along with the infeftment to follow thereon. Infeftment was so taken, the trustees entered on the management of the estates, and continued so for several years, during which several attempts were made to sell the estates, but ineffectually.

Roderick Mackenzie having died, the trustees finding it not easy to sell the estate to the satisfaction of Kenneth Mackenzie, resolved to give up the trust; and accordingly reconveyed the estate in favour of Kenneth Mackenzie, in terms of the destination in the above contract of marriage. That the creditors might not suffer by their relinquishing the trust, they granted this reconveyance under burden of these several debts.

It was meant and understood that Kenneth Mackenzie would take infestment on this reconveyance, in order to render these debts real burdens upon the estate, so as to secure them a preference against all subsequent contractions. But Mr. Mackenzie did not take infestment under this reconveyance, so that the title to the estate in his person remained on the footing of the contract of marriage.

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The creditors thereafter began to adjudge the estate, and a judicial sale was afterwards brought, under which the estate was sold, and brought £25,000, a price considerably short of paying the creditors their full debt.

In the ranking of the creditors, the common agent proposed to prefer the creditors whose debts were specified in the list relative to the trust-deed over the other creditors not therein included. The objections embraced in the previous appeal as to the children's provisions, and the objection to the whole adjudications led, except the first, were stated.

The objection stated to the trust-deed creditors, was as follows: "That by the conception of the trust-deed, the debts in question had not been rendered real burdens upon the estate; that, therefore, and as the trustees had given up the trust, and allowed the judicial sale to proceed, the creditors could derive no preference in virtue of that deed, but ought to be ranked upon the grounds of debt and diligences produced for them respectively, according to the ordinary rules of law."

On report to the whole Lords, the Court pronounced this Jan. 27, 1791. interlocutor:—"In respect that the debts were not rendered real burdens on the lands by the trust right, and in respect that the trust right has been given up and abandoned, they refuse the desire of the petition, and adhere to the interlocutor of the Lord Ordinary." On second petition Feb. 15, 1791. the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—It is quite clear that a proper heritable security may be created in the form of a trust-deed. A debtor may dispoise his estate to one creditor, with power to sell the estate in satisfaction of his debt. In like manner, he may dispoise his estate to all his creditors, in the same terms and for the same purpose; and when such security is completed by infestment, the whole debts due to the creditors, in whose favour it is granted, will of course be

1795. effectually secured upon the lands. But where the creditors are numerous, it is troublesome to give a security in these terms; and, for that reason, it is common to convey the estate to trustees, with power to act for the whole creditors, and to sell the estate, and apply the price in payment of the particular debts specified in the disposition, and infestment following upon it. By such a deed, the debts are as completely and as effectually rendered a real burden upon the estate as when it conveyed to one creditor or to all the creditors *nominatim* in security of the debts due to them.

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Ersk. B. 2, t. 2, § 15. "Where a debtor," says Mr. Erskine, "conveys a land estate to his creditors, for their security of payment, such conveyance makes the debts due to them heritable, though they had been originally moveable, since they are by that deed secured over the debtor's heritage; and the law is the same, though the estate should be conveyed to a trustee for behoof of the creditors; for the trustee being only a name, the trust-deed is considered in the same light as if it were granted to the creditors themselves." And it being thus unquestionable that a real security may be created in the form of a trust-deed, the point to be considered is, Whether such was truly the object, the nature, and the effect, of the deed in question? It is apparent from every clause in the deed that such was the object of it, and the intention of parties. It is granted for the payment of these, "*conform to a list subscribed by the granters,*" and that list is appointed to be registered, which was done accordingly, and all acted on the faith that these creditors were preferable.

Pleaded for the Respondents.—According to the law of Scotland, a real lien or burden, in security of the payment of any debt or sum of money, may be created upon lands, or other heritable estate, by deed of disposition, granted either directly in favour of the creditor himself, or in favour of a third party, burdened with the payment of a sum of money due to that creditor. When intended to be created in this form, it is requisite that the dispositive clause of the deed shall expressly bear that the lands are disposed with and under the burden of the particular debt; the creditor, and the amount of the debt must be particularly specified; and, lastly, the instrument of sasine taken upon the deed, must, in like manner, express the burden. The sasine, when duly recorded in the proper register, completes the right and the burden.

According to the same law, a deed, conveying a landed

estate, may be conceived in such manner as to create a personal obligation upon the disponent to make payment of a debt mentioned to a creditor named, but not to create any real burden upon the lands disposed in favour of that creditor; and that is precisely the situation which, by the conception of the trust-deed in question, these creditors, mentioned in the list, are placed. No more is imported than a simple declaration that the receiver shall be bound to make the payment, or that the deed is granted for the purpose of such payment. And it adds nothing to the force of the right, though this clause be inserted in the sasine, and appear upon the record. No real burden has therefore been created, and nothing but a personal obligation on the trustees to execute the purposes therein set forth appears.

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After hearing counsel for five days, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *Wm. Adam, Thos. Macdonald.*

For Respondents, *Sir J. Scott, Wm. Tait.*

THOMAS MARTIN and Attorney, . . . *Appellants.*
JAMES MARTIN, RICHARD STONE, and J. FOOTE, *Respondents.*

House of Lords, 17th June 1795.

ADJUDICATION—HERITABLE OR MOVEABLE—APPROBATE AND RE-
PROBATE—FOREIGN WILL—HOMOLOGATION.—A party domiciled in England, executed a will in the English form, leaving only a liferent of part of his estate to his heir at law, his eldest son, remainder to other heirs. The residue of his real estate, “*not by him otherwise disposed of,*” he bequeathed to his three younger sons, equally between them. No special mention was made of three several bonds due by the York Buildings Co., upon which adjudications had been led against their estates in Scotland. After enjoying his liferent under this will for sixteen years, the eldest son raised a declarator, and claimed the bonds as heritable estate, which an English will could not carry. Held, that as he had taken benefit so long under his father’s will, he could not now reprobate the same.

The appellant’s father, Joseph Martin, died worth £100,000, consisting of real and personal estate in England, where he was domiciled. He had four sons, of whom the appellant was the eldest, but having incurred his father’s displeasure, he, by his father’s will, was only provided with a liferent of the surplus rents, payable out of his father’s estate of Cheshunt, remainder in tail male to the use of his son or sons of his

1795. body, if any, whom failing, to the use of the testator's second son, Joseph Martin, and his assigns, during his life, remainder to the use of the first and other sons of his body, and so on to the testator's other sons. "The rest and residue of his real and personal estate, not by him otherwise disposed of," he bequeathed to his three younger sons, Joseph, Charles, and George, equally between them, share and share alike.

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Part of the deceased Joseph Martin's property consisted of three bonds by the York Buildings Co. for £500 each, due to his own father, Thomas Martin, upon which decree of adjudication had been obtained against the Company's estates in Scotland, in Joseph Martin and John Parker's names, *qua* executors of Thomas Martin's will. The adjudication debt not having been specially mentioned in the will of Joseph Martin, the question was, Whether it was carried by the will? The debt had accumulated to £4059, as at this date, and fell to be paid, but a title through the appellant as heir at law being demanded, he refused, but afterwards granted a deed of release, upon the understanding that he had no right to the debt contained in the adjudication. Sometime thereafter he raised the present reduction and declarator, to have the deed of release set aside, and to have it found and declared, that he had best right, as heir at law of his father, to the debt in the adjudication, the same being heritable in its nature, and descending to the heir at law. On the following grounds, 1st, Assuming the will was broad enough to carry the adjudications as real estate, yet, by the law of Scotland, a will in the English form is ineffectual to carry heritable estate in Scotland, and the adjudications being heritable property, could not be so carried. 2d, That the adjudication was not included in the will, and therefore, in the situation of real estate, of which the testator had made no disposition.

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In 1790.

In answer, the respondents pleaded the assignment and release as a bar to the reduction, and further, contended that the adjudication in question, supposing it real estate, came within the intendment of the will of Joseph Martin, and the appellant having received his annuity under the will of his father for sixteen years, had barred the claim by homologation. Further, that the debt was not heritable in Joseph.

Dec. 13, 1792.

The Lord Ordinary found, "That the words of the will are sufficiently broad to comprehend the adjudication in question, and although that will does not contain words sufficient to convey feudal property by the law of Scotland,

“ and that it is not authenticated in terms of the statute
 “ 1681, yet, in respect Thomas Martin, the pursuer, has
 “ taken benefit under the said will, finds that he is not en-
 “ titled to approbate and reprobate the same deed, but that
 “ he is bound to implement the same in favour of the trus-
 “ tees ; and of consequence finds, that the deed of assign-
 “ ment and indentures of release, now under challenge,
 “ were not deeds done to his prejudice, nothing more being
 “ there done than what the trustees could have done inde-
 “ pendent of him by an adjudication in implement.” On
 representation against this interlocutor, *to the effect of ob-*
*tainin*g leave to reprobate the will, the Lord Ordinary, of
 this date, pronounced this interlocutor,—“ In respect the
 “ pursuer has taken benefit under his father’s will for the
 “ space of sixteen years, finds he is not entitled to repro-
 “ bate the said will.”

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Jan. 24, 1793.

On two several reclaiming petitions, the Court adhered.*
 Against these interlocutors the present appeal was
 brought.

Dec. 18, 1793.

Mar. 4, 1794.

Pleaded for the Appellants.—Consent in every transaction
 is of the essence of the contract, and whenever any of the
 parties act under a mistake in regard to the subject matter
 of the contract, there can be no consent, and the contract
 is not binding ; such mistakes being errors *in substantialibus*,
 void the contract. The error here was on both sides, for the re-
 spondents, who were executors under his father’s will, had no
 interest in the adjudication in question ; but, conceiving that
 it was carried by the will, applied to the appellant to execute
 the deed of release sought to be reduced. Under the same
 belief that the will carried the adjudications, the appellant

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—“ This is a question of homologa-
 tion.” (See former notes).

LORD ESKGROVE.—“ I am for altering.”

LORD SWINTON.—“ Of the same opinion.”

LORD PRESIDENT.—“ I am for altering upon the point decided.
 But I doubt whether it was heritable in Joseph Martin’s person.”

LORD JUSTICE CLERK.—“ It was clearly heritable. The trustees
 held it for him; and it would have been against their duty to turn it
 into money, if there was money sufficient to pay the debts and lega-
 cies. They fell to convey the subject itself.”

The Court adhered to former judgment.—Vide President Camp-
 bell’s Session Papers, vol. 73.

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signed that deed, so that there is error here in the very subject matter of the transaction, and therefore that deed ought to be set aside. 2d, Real or heritable property in Scotland, not passing by a will, it makes no difference whether it is the will of a Scotsman residing abroad, or of an Englishman domiciled in England, having real property in Scotland, and there being no conveyance of the adjudication, the property thereof belongs to the appellant, as heir at law, which he is entitled to take, over and above the annuity bequeathed to him by his father; or, at least, he is entitled to his election, and to take either the one or other.

Pleaded for the Respondents.—The adjudication in question was led by Joseph Martin and John Parker, *qua* executors of Thomas Martin of Clapham, and not by Joseph Martin in his individual capacity. It could not, therefore, be heritable property in him. He had merely a personal claim to have the benefit of the trust, and that personal claim was transmitted to his executors by his will. 2d, But supposing the adjudication to have been heritable, the words of Joseph Martin's will were sufficient to carry that and every species of estate belonging to him; and therefore, as the adjudication debt, if situated in England, would undoubtedly have been carried by the will as real property, the appellant cannot take benefit from and under that will, and at sametime claim the Scottish heritage, because that would be to approbate and reprobate the same deed. He has already made his election, by accepting the annuity under the will, and now it was impossible for him to plead ignorance of his rights, or the nature of the deed of release, the deed itself informed him. The case laid before English counsel informed him of this right, and that he could not claim both under and against the will. In these circumstances he executes the deed of release. After this, and after an election so deliberately made, confirmed by so many unequivocal acts, and adhered to for sixteen years, the appellant cannot now open up the whole transaction.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Wm. Adam, Wm. Tait.*

For Respondents, *Sir John Scott, W. Grant.*

NOTE.—Unreported in Court of Session.

1795.

The Hon. ARCHIBALD FRAZER, *Appellant* ;

HIS MAJESTY'S ADVOCATE, on behalf of the
Public ; and

SIMON FRAZER, Esq., and Others, as trus-
tees of the estates of the late Major
General Frazer,

Respondents.

FRAZER
v.
HIS MAJESTY'S
ADVOCATE, &c.

House of Lords, 23d Nov. 1795.

ENTAIL—FEE OR LIFERENT—COMPETENCY OF APPEAL.—Circumstances in which, by the terms of a destination in an entail, with certain powers reserved, that the entailer still held the fee simple of the estate, and on his attainder was forfeited to the crown. An appeal having been brought against this judgment of the Court of Session, and having been afterwards withdrawn, and the judgment affirmed, a second appeal of the same judgment was brought, more than thirty years thereafter. Held, that this appeal was incompetent, both under the vesting act, and also under the orders of the House of Lords, of 25th March 1725, making appeals incompetent after the lapse of five years.

Simon Lord Lovat was attainted for high treason, and his estates forfeited to the crown in 1747.

He had three sons, Simon, afterwards General Frazer, Alexander and Archibald, the appellant. His eldest son Simon was also attainted. Alexander afterwards died. But Simon Frazer, the son, having many years thereafter, on the outbreak of the war in America, formed the plan of raising from among his clan a regiment of Highlanders for the service of the government, he went to Canada, and performed such important services for the government, as soon to raise him to the rank of General.

His father, the attainted Lord, previous to his forfeiture, had executed a deed of entail, whereby he disposed his estates to his eldest son, Simon, stiled Master of Lovat, and the heirs male of his body ; whom failing, to Alexander Frazer, his second son, and the heirs male of his body ; whom failing, to Archibald Frazer (the appellant), his third son, and the heirs male of his body, &c. He reserved to himself “ full power and liberty of administration and intro-
“ mission over the whole estate during my life, and to con-
“ tract debt, and grant security therefor, real and personal,
“ and to grant feu rights and wadset rights of the same,

1741.

1795. " and tacks long or short, and to make such appointments
 FRAZER " regarding the rents falling due, even after my death, for
 v " the payment of my debts, as I shall think fit, and to be
 HIS MAJESTY'S " sole factor and curator to the heirs of tailzie above men-
 ADVOCATE, &c. " tioned, during my life, in the means and estate belonging
 " to me, in virtue hereof."

In 1749 the appellant's eldest brother, being then attainted, and Alexander dead, the appellant lodged a claim, which was entered in the Court of Session, praying, " That the life-
 " rent, and other powers reserved to the said Simon, Lord
 " Frazer, did determine and expire by his death; and that
 " their Lordships would find that no greater estate than an
 " estate for the life of the said Simon Frazer, Esq., elder
 " brother of the claimant, was vested in his Majesty by the
 " attainder of the said Simon Frazer."

Nov. 21, 1750. After hearing counsel argue the case, the Court, of this date, pronounced this interlocutor:—"The Lords having con-
 " sidered the claim given in for Alexander (since dead) and
 " Archibald Frazers, to the estate of Lovat, with the an-
 " swers for his Majesty's Advocate on behalf of the crown,
 " they find the real feudal right to the estate being in the
 " person of Simon Lord Lovat, and the vassal to the crown
 " therein at the time of his treason and attainder, and not-
 " withstanding of the personal right made to Simon Frazer,
 " the son, full powers were reserved to Simon the father to
 " charge the estate with debt at pleasure, to alienate the
 " same by granting feu rights and wadsets of the whole, or
 " part thereof, as he thought fit, and to uplift the rents, and
 " to apply the same to what uses he thought proper, during
 " his life, without being accountable; that the infeftment of
 " property did remain in him for all these ends and pur-
 " poses; and that the real and substantial estate of fee and
 " inheritance, did continue and subsist in the said Simon
 " Lord Lovat, therefore was forfeited for his treason, and is
 " by his attainder forfeited accordingly, and therefore dis-
 " misses the claim."

Nov. 26, 1751. From this judgment an appeal was taken to the House of Lords, but the parties having petitioned the House to with-
 draw it, the appeal was dismissed.

General Simon Frazer having returned to this country from America, stood so high in the favour of the govern-
 ment, that, on presenting his petition, claiming the estates
 of Lovat, his Majesty was pleased to grant the same, as
 freely and fully as they had been vested in the late Lord
 Lovat, previous to his attainder.

It was stated by the appellant, that by the above entail, General Frazer's interest could only extend to a liferent. But the General contended that the full fee of the estate had been vested in him by the conception of the entail.

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FRAZER

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HIS MAJESTY'S
ADVOCATE, &c

General Frazer conveyed the estates in trust to the respondents, his trustees, for certain purposes, and having died without altering the said conveyance, the respondents, since his death, have been in possession, executing the trusts committed to them.

The appellant in 1784, thought proper again to appeal from the said decree of the Court of Session, of 21st Nov. 1750.

Pleaded for the Appellant.—The trustees of General Frazer can have no right but in consequence of the act of parliament, vesting the estate of Lovat in General Frazer, and as that act expressly saves the right that was in the appellant, the right of the trustees cannot overrule that act. 2. If the objection to the competency of this appeal be well founded, it is *jus tertii* to General Frazer's trustees to state it. They are *third* parties, who have no right or interest in the decree, or in the appeal from it; the objection was only competent to his Majesty's Advocate, as he was the only party to the suit in the Court of Session, and it was the crown only that was interested in the finality of the judgment, after a certain limited time. But even supposing that there were some grounds for the objection, it ought not to bar the present appeal. The appellant, at the time of the former appeal, was a minor. He was, besides, *non valens agere cum effectu*. He knew nothing of the former appeal, and therefore ought to be restored thereagainst.

Pleaded for the Respondents.—The decree of the Court of Session was affirmed by your Lordships, upon appeal regularly entered as far back as the year 1751. Even if that proceeding could be got over, still the present appeal would be barred by the act of his late Majesty, whereby the decrees of the Court of Session are declared to be final and binding upon all parties concerned, after the elapse of thirty days without any appeal being taken. Instead of thirty days, more than thirty years have elapsed in the present case. The appeal is farther barred by your Lordships' standing order of 25th March 1725, whereby no appeal can be received after five years from the date of the decree. 2. Besides, the fee and inheritance of the estate were in the late Lord Lovat, and, in this state, became forfeited to the crown.

1795. The grant to General Frazer was of that estate, as so vested
 ——— in the crown, as fully and freely as if it had been in Lord
 GORDON Lovat, and therefore the appellant has no right to challenge
 v. the conveyance of General Frazer to the trustees.
 DOUGLAS, After hearing counsel, it was
 HERON & CO. Ordered and adjudged that the appeal be dismissed, and
 that the interlocutor therein complained of be affirmed.
 For Appellant, *W. Grant, R. M^cIntosh.*
 For Respondents, *W. Adam.*

(Fac. Col.)

ALEX. GORDON of Culvenan, Esq., *Appellant ;*
 DOUGLAS, HERON & Co., Bankers, Ayr, and } *Respondents.*
 GEORGE HOME, their Factor, }

House of Lords, 24th Dec. 1795.

PARTNERSHIP — DISSOLUTION OF — TITLE TO SUE.—The Douglas, Heron & Co. Banking Company stopped payment, and having resolved to wind up the concern, they, in conformity with an article in their contract, held a general meeting of the Company, and appointed a committee with full powers to wind up the concern, and authorized the committee, or their quorum, to do so. The quorum of the committee, by commission, delegated their powers on George Home. It was found that a large deficiency required to be made up by the individual partners in proportion to their shares. The appellant, as a partner, refused to pay his share, and action being raised, in name of Douglas, Heron & Co., late bankers in Ayr, and George Home, Esq., their factor and manager ; and objection being stated to this title to sue, on the ground that action was not competent in the Company's social name, without also naming the individual partners, the Company being dissolved : Held, that every copartnery must from its nature subsist after its dissolution to the effect of winding up its affairs, supposing there were no provision in the contract to this effect ; but, in the present case, there was in the contract a special provision for this purpose, and therefore that the title to sue was unexceptionable.

The appellant was a partner, holding two shares of £500 each, in Douglas, Heron & Co.'s banking concern. The Company proving unfortunate in business, was obliged to

stop payment, and finally resolve to wind up the concern in August 1733, which resolution was fixed on at a general meeting of the Company, they appointing a committee, with full powers to them or their quorum. The quorum of this committee, by a commission signed by them, delegated their powers for this purpose on the respondent, George Home.

The debts of the Company being ascertained, a large deficiency fell to be made up by the shareholders, amounting to £2200 per share, and the appellant being called on to pay the deficiency on his shares, refused, the consequence was, that the respondents raised an action for payment in name of "Douglas, Heron & Company, late bankers in Ayr, and George Home, Esq. of Braxton, their factor and manager, conform to factory and commission, granted by a quorum of the committee named for winding up the affairs of the said Company, bearing date 13th and 14th August, 3d September 1773, and 12th July 1774;" and concluding that he should be decerned "to make payment to the said Messrs. Douglas, Heron & Co., and to the said George Home, their factor and manager, pursuers, of the above-mentioned sum of £4400 Sterling, as his proportion of the present deficiency in the funds of the Company and interest thereof, from and since the term of Lammas 1788 years, until payment."

The defences stated to this action were confined to the title to sue, and preliminary in their nature. 1. That as the "concern of Douglas, Heron & Co., late bankers in Ayr," at whose instance the suit was raised, was long since and is now a dissolved Company, action was not competent in their social name, without the names of the individual partners. 2. The addition of the name of Mr. Home, as manager or factor, did not mend the matter, because, although he is said to have been appointed by a quorum of the committee of management, yet it did not state that the action proceeded at the instance of that committee or quorum thereof.

The Lord Ordinary pronounced this interlocutor:—"Finds Dec. 24, 1791. "that every copartnery must, from its nature, subsist after "it has been dissolved, or the term for which it was entered into expired, to the effect of winding up its affairs, "although there were no proviso in the contract constituting "it for that purpose: Finds, that the contract in question "does, in the 15th Article, contain a special proviso for that "purpose, which has been followed out, by naming persons "as therein directed: Finds, that the powers and proceed-

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HERON & CO.

June 22, 1789.

1795. "ings of the said persons were recognized and approved of
 ——— " by the defender himself in his proposals, 3d January 1774,
 GORDON " given 'to the committee for managing the affairs of
 v. " Douglas, Heron & Co.' and in his representation to the
 DOUGLAS, " General Meeting in 1778. On all, and each of these
 HERON & CO. " grounds, repels the defender's objections to the title of the
 Feb. 14, 1792. " pursuers to insist in this action." On representation, this
 June 16, 1792. interlocutor was adhered to, and, on two reclaiming peti-
 July 11, — tions, the Court also adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—Undoubtedly, the copartnery subsists to some effects after its dissolution, but not to all and to every effect. In so far as the joint and separate obligation of the partners are concerned to discharge partnership, engagements to strangers, and their implied engagements to one another, it certainly does subsist. But it does not subsist to the effect of authorizing a number of partners to bring an action against their copartners, in the name and by assuming the style or form of the late copartnership; because of the dissolution, they, as pursuers, have no more right to assume the style and firm of the Company than the defenders have who are sued, and who with themselves have an equal right to assume that style and firm. It is quite evident, therefore, that an action brought in the circumstances of this case, ought to have been by the *whole* individual partners, alleging themselves damnified by the defender's refusal to pay his share of the deficiency. And it makes no difference to this objection, whether the articles, in this case, contain a special provision for the subsistence of the partnership, because that clause cannot be construed to cover a plain and evident irregularity, or mend a glaring defect in the instance. Nor is the proviso in the contract such as to warrant this construction. It only provides, that in the event of a dissolution, " proper persons should be appointed
 " to levy the whole debts due to the Company, and to turn
 " the estate and effects into cash, and apply the neat proceeds thereof, in the first place, to the extinction of the
 " debts due by the Company; and next, towards reimbursing
 " the partners of the sums as may have been advanced by
 " them for carrying on the joint business, and the remainder
 " to be divided among all the partners proportionally." But no power is given to sue in the form objected to, and no power given to call for money from partners beyond the subscribed stock. Again, it is equally aside from the ques-

tion, to say, that the appellant recognized the proceedings of the committee of partners appointed to wind up the affairs, because they are not the pursuers here, and the very objection raised is, that they are not pursuers.

Pleaded for the Respondents.—That this Company does, and that every other company may subsist, after its dissolution, for the purpose of winding up its affairs, and that they may act in all respects as a company, whether in carrying on actions or otherwise, is a point admitted by the appellant. Under the term winding up its affairs, is necessarily implied, the power to bring actions, if necessary, for that purpose, just in the same manner as if no dissolution existed. This being a point of settled law, it is further strengthened by the proviso in the contract in question, which makes the company to subsist after its dissolution, *inter alia* “to compel any partner to contribute more to the company’s stock than the precise sum by him originally subscribed for.” The exception to the instance, in so far as brought in the descriptive name or style of the firm, is therefore groundless. The Company has always been recognized by this style, in the copartnery, in acts of Parliament, and by its own practice in pursuing otherwise, all of which the appellant has homologated, so as to bar him now from stating the objection. He says, that all the individual members ought to have joined in the instance; but all are, in point of fact, joined in the action under the social firm, and it is therefore immaterial which way they appear, whether enumerated or otherwise. Nor is it any answer to this to say, that a corporation only can have such a privilege of so pursuing in its corporate name; because this case is different—to sue in a corporate name is to sue as a body politic; but it does not follow that the rules applicable to such bodies are to be applied to a mercantile company, which is united for a different object. Here the general meeting of partners authorised certain things to be done for the purpose of winding up. In doing this, they necessarily gave instructions to raise an action at the instance of the Company, and the action being so authorised, it can make no difference whether the partners be enumerated, or the social name alone be used. But here, in addition to the style and firm of the Company, there is the factor and manager authorised by the general body of creditors.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed,

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HERON & CO.

1796.

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v.
KINLOCH, &c.

and that the action do proceed in the Court below between the appellant and respondents. And it is further ordered, that an account be taken of all the dealings and transactions of the partnership, and in winding up the affairs thereof, in as far as necessary, to ascertain the loss of the concern generally, to which the copartners are obliged to contribute rateably. And also, what sums have been paid or contributed by individual partners beyond the rateable proportions of such individuals, and applied in diminution of the debts of the partnership; and that the appellant do pay what shall be found to be his proportion of the balance of loss upon the result of such account, rateably with those who had paid their proportions in relief, proportionably of what has been reasonably and properly paid or contributed by any of his copartners beyond their rateable proportions of the balance, so to be ascertained and applied towards diminution of what the whole partners were liable to pay. And with these instructions, the cause be remitted to the Court of Session to proceed accordingly.

For Appellant, *Sir J. Scott, Wm. Grant.*

For Respondents, *George Ferguson, Robert Dallas.*

DAVID LINDSAY, General Disponee of Mrs.
Margaret Balneaves, his late Wife,
Daughter of John Balneaves of Carn- } *Appellant;*
baddie,

GEORGE KINLOCH of Kinloch, and JOHN } *Respondents.*
NAIRN, *et e contra.*

House of Lords, 17th Feb. 1796.

EXECUTRY—TACITURNITY.—In a claim made for a daughter's share in the executry of her deceased father, thirty-six years after his death. Held, in the circumstances, that there was no free executry, and nothing due to her.

This was an action raised by the appellant, at the distance of thirty-six years, for his deceased wife's share of executry in her father's estate, which after a great deal of procedure

and accounting, ended in the Court pronouncing this interlocutor:—"Repel the objection to the title of the pursuer, David Lindsay, as to Margaret Balneaves' share of the executry of John Balneaves of Carnbaddie, her father, but find no sufficient evidence that the said John Balneaves left any free executry at his death, and therefore assoilzie the defenders (respondents), but find no expenses due."

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v.

KINLOCH, &c.
May 19, 1790.

On reclaiming petition, the Court pronounced this interlocutor: "Find there is nothing due to the pursuer (appellant), and adhered."

Against these and former interlocutors, the present appeal was brought.

Pleaded for the Appellant.—1. The two judgments of the Court, of 19th May and 8th June 1790, seem to be at variance with each other, and to put the determination of the Court on perfectly different grounds. The first finds no sufficient evidence that the said John Balneaves left any free executry at his death. If your Lordships be of opinion that the 14,000 merks due by Inch Murray, went to the next of kin, and not to the heir, and that the respondents are not entitled to any allowance in name of board, for the period the appellant's wife lived with her grandmother, which two facts form the important part of this cause, then it is obvious that Mr. Balneaves left a very considerable personal estate. The last interlocutor on the 8th June, finds, "That there is nothing due to the appellant." There was nothing either in the petition or the previous procedure, to enable the Court to assume this *general ground*, or to go further than the interlocutor complained, which only found that there was no free executry left at his death. 2. The objection as to the delay in raising this action, is ill founded. The appellant's wife was just one year old at her father's death, in 1729. It was not till 1750 that she was called to maintain an action. At this period, and until her marriage in 1759, she resided with her brother, and acted as his house-keeper. It was not to be expected that she would during this period demand her claims from her brother. It was only when she got married that her separate rights of fortune behoved to be inquired into, and thus the taciturnity in a claim of succession of this nature ought not to be regarded.

Pleaded for the Respondents.—1. The interlocutors appealed from, were substantially right, and agreeable to law, and to the evidence. The pursuer's allegation was, That Carnbaddie, at his death, was possessed of an unencumbered personal estate, amounting to £1500 sterling, to which his

1796. younger children were entitled, exclusive of the eldest son and heir. On the other hand, the defenders (respondents) maintained, 1st, That through the lapse of time, the allegation was inadmissible; 2d, That the evidence referred to by the pursuer (appellant), so far from establishing the facts which were to be proved, tended to show that Carnbaddie, after his debts were paid, had no personal estate to which his younger children were entitled; and these were the two grounds on which the judgment of the Court rested. 2. The objection on the ground of taciturnity is not taken away by the circumstances of the case. On the contrary, it is peculiarly applicable to questions with regard to the distribution of personal estate; and cases have occurred where the silence of the party for any considerable length of time, was fatal to the claim. Thus, a widow's claim for the legal share of the moveable effects of her deceased husband, was disallowed, after the lapse of twenty-six years. So also a claim made by younger children against their elder brother, was dismissed, not having been made until thirteen years after their father's death. In the present case, no less than thirty-six years have elapsed before any action had been brought, or any notice given to the defenders that a claim was to be made. The daughter's nonage is no answer, because this objection rests on the silence of her whole family, all of them older than her, and placed in different circumstances.

Tod v. Inglis, 2d Feb. 1770. This case is not reported; but is referred to in the case of the King's Advocate v. M'Allum. M'Laurin's Crim. Cases, p. 606. Wilson v. Wilson, 26th Nov. 1783. Fac. Coll.

After hearing counsel, on the 5th, 8th, 9th, 11th, and 12th days of this instant, February, and due consideration had of what was offered,

It was ordered and adjudged, that the interlocutor of the 8th June 1790, complained of in the appeal, be affirmed, and that the defenders be assoilzied.

For Appellant, *Wm. Adam, Tho. Macdonald.*

For Respondents, *W. Grant, J. Buchan Hepburn.*

MISS KATHERINE MERCER, eldest daughter of Colonel Wm. Mercer, } *Appellant;*
 SIR JOHN OGILVY, Bart., and Others, . *Respondents.*

House of Lords, 1st March 1796.

DEATHBED—SIXTY DAYS HOW COMPUTED—NOMINATION OF HEIR.—(1). In a reduction of deeds, executed on deathbed, by a person who lived fifty-nine days and two or three hours thereafter; Held, that the rule

dies inceptus pro completo habetur did not apply to such a case, and that, by the statute 1696, the sixty days, consisting of twenty-four hours each, behoved to be complete, in order to cut off the objection of death bed. (2). One of the deeds executed by the deceased the day previous to the one sought to be reduced, contained no clauses applicable to the disposal of heritage; but there was a clause, importing that the appellant was to succeed as heir in the first place, and evidently referring to some deed either executed, or to be executed to that effect. The appellant maintained that the clause contained an actual appointment, or nomination of her as heir, to take before the deceased's other heirs. Held, that this deed did not contain any appointment or nomination of heir sufficient to carry the estate in question to Miss K. Mercer.

1796.

MERCER
v.
OGILVY, &c.

Mr. Robert Mercer of Lethindy, was the last of the sons of Sir Lawrence Mercer of Lethindy, by his second marriage with Lady Kinloch,—the appellant and respondents were descendants of his three daughters by his first marriage with the heiress of Aldie. The estate had been forfeited by his son Lawrence's rebellion in 1745, but was redeemed by his brother Charles by purchase, and had now, by his death without issue, descended as an unlimited fee, to Robert Mercer, his third son.

Having received a hurt in the leg from a fall, which exhibited a very bad appearance, and showed some symptoms of a tendency to mortification, he, in January, had several meetings with his lawyer, for the purpose of making the settlements of his estate. He was then confined to the house, but going about with a staff; and this, with a weakness, or complaint in his stomach, were the only complaints Mr. Mercer then had. In these circumstances, he executed three deeds of settlement, namely, one on the 19th February, conveying a farm to his natural son, James Mercer, containing a reference to the settlement of the rest of the estate, to the effect of stating, that failing James Mercer, the farm was to go to his "heirs of provision." On the 21st Feb. Mr. Mercer executed a second deed, giving a life-rent of part of his estate of Lethindy to his natural son, containing this obligation, "I bind and oblige myself, my heirs of "tailzie and provision, and successors whatsoever, to grant, "subscribe, and deliver all formal writs and deeds requisite "for establishing the foresaid liferent provision. And I oblige "myself and heirs succeeding in my estates, to warrant, &c." Then follows the clause in which he nominates the appel-

1791.

1796. ———
 MERCER
 v.
 OGILVY, &c. lant to be his heir, to succeed to him in the lands and estate, and gives directions to her in that charactor: “ And I do “ hereby recommend to Miss Katherine Mercer, *who is heir* “ *first appointed to succeed to me*, to pay to Charles Mercer,” &c., and “ recommend to her, and to the other heirs, upon “ whom my lands shall devolve, still to continue him in the “ management of my said lands and estate.” This deed contained no dispositive words, conveying the lands expressly to her. On 22d February 1791, on Tuesday at 8 o’clock in the evening, he executed an entail of his estate of Lethindy, *in favour of the appellant*, and on 23d March following, executed a disposition of the estate of Fardle upon his natural son. He died on 22d April 1791, and the respondents being (together with the appellant) his heirs at law, raised a reduction of those deeds—the two last, 22d February and 23d March, being sought to be reduced on the head of death-bed, setting forth, 1st, That before Mr. Mercer executed any of these deeds, he had contracted the disease of which he died. 2d, That he did not live sixty days after the date of these deeds. A proof being allowed and taken, the points discussed were, 1. Whether Mr. Mercer, when he executed the deeds challenged, had contracted the disease of which he afterwards died? 2. Whether Mr. Mercer executed that deed on the 22d February 1791, between seven and eight o’clock in the evening, and died the 22d April thereafter, between 10 and 11 o’clock at night, he had lived the statutable period of sixty days, introduced by the act of parliament 1696? 3d. Whether, in the deed that was executed on the 21st of February, there was an *institutio hæredis* in favour of the appellant, sufficient to give her the estate, if it were admitted that the subsequent deed of 22d of February was executed within sixty days of Mr. Mercer’s death?
- Dec. 1, 1792. The Lords found that “ the deceased had, at the date of the “ deeds sought to be reduced, contracted the disease of which “ he afterwards died,” and ordered memorials as to the other points.
- May 28 & 30, 1793. Of this date, the Lords “sustained the objection to the deed “ of tailzie, dated 22d February 1791, that the said Robert “ Mercer did not live sixty days after the execution of the “ deed. Parties to be further heard as to the other points.*

* Opinions of Judges:—

LORD PRESIDENT CAMPBELL.—“ 1st point, Whether Mr. Mercer lived sixty days in the sense of the act?

They finally repelled “ the defences, as to the deed 21st February, and also as to the deed 23d February and 28th March 1791, and reduced the two latter deeds, as well as the “ infestment thereon.” (Vide bottom note p. 439).

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“ Counting *de momento in momentum*, he lived fifty-nine days and some hours. But counting *de die in diem*, and holding the 22d February to be the first day agreeable to the rule laid down in the English authorities, he lived fifty-nine days complete, and part of another day, for he died while the 60th day was current. Ergo, he did not live sixty days as required by the statute, unless we hold that the commencement of the sixtieth day is by construction of law the same with its being complete.

Viner, vol. xx.
p. 269, Sal-
keld's Reports.

“ It is said that fractions of days are to be laid aside. True.— But, Whether are we to make a present of them to the one party or the other? At the commencement of the time, we count the first day as an entire day, and therefore we give the benefit of the fraction to the defenders, holding the deed as executed upon the first moment of that day, when in fact it was not signed until the evening. The act contains nothing contrary to this, and the rule laid down in the English cases seems to be founded on reason.

“ But, as to the second period, viz., the last of the sixty days both the words and the sense of the act require that it should be complete ; for it is plain that a person who lives fifty-nine days and two or three hours only, does not live for the space of three score days, and there is no more reason for holding the last day complete, when only begun, than to make the same rule as to the last week. Had the act only said, that the person must live till he attains to the sixtieth day, it would be enough to find him alive that day, and in some cases, *e. g. testamenti factio*, this is held by construction of law to be the case as to the last day of the year, and the text quoted takes a still greater latitude in the case of enjoying honours, viz., a whole year. None of them apply to the case in hand, which relates to a statutory exception from the former law, limited and described in a certain manner, and the question is, Whether the party founding on this exception can avail himself of it, without showing that the condition has been literally and fully complied with.

Text quoted
by Vinnius &
Voet, from
Ulpian, “ L. 5,
qui. test. fac.
possit.”

“ It would be too violent a stretch to count both the first and last days complete, when neither of them were so. It is admitted that the counting ought not to be *de momento in momentum*, but *de die in diem*, and therefore, had the testator, in this case, lived till 12 o'clock at night of the last day, or, in other words, survived the whole of that day, the condition of the law would have been complied with, although counting *de momento in momentum*, from the

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 ———
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 Dec. 19, 1793.

Against these interlocutors the present appeal was brought.
Pleaded for the Appellants.—1. Mr. Mercer, when he executed the deeds under challenge, had not contracted the disease of which he afterwards died. He was feeble and

date of execution, sixty days of twenty-four hours each would not have been completed.

“ In the case of *Crawford v. Kinnaird*, Lord President Dundas laid down the rule thus :—“ The day on which the deed is executed “ is to be counted one day, and it requires fifty-nine days more to “ be completed, to make out the sixty.” This opinion was correct, and ought to be adopted here.

“ Second point.—This is attended with more difficulty, on account of the express reference in the second deed. The first deed contains no reference to, or mention of Miss Mercer, and none of the other clauses in the second deed are of importance, except that which says, “ I do recommend to Miss K. Mercer, who is the heir “ first appointed to succeed to me, to pay,” &c. The clause which immediately follows, recommending to Miss K. Mercer and the other heirs, &c., is of importance, because, independent of the deeds in question, Miss K. Mercer was one of the heirs. And even the first clause may admit of a construction, that he had in view the old tailzie 1722, by which Miss K. Mercer would have succeeded in the first place, (unless Miss Elphinstone, the daughter of the eldest sister, is entitled to hold both Aldie and Lethindy), as he might be ignorant that this was done away by the forfeiture, &c. Indeed, there seems to have been some mistake as to the effect of the forfeiture *quoad* the substitute heirs. Vide Decisions, House of Lords, in case of *Gordon of Park*, (vide Ante, vol. i., p. 508 *et* p. 562). and perhaps Miss K. Mercer may still be advised to try this point, unless the vesting act stands in the way.

“ But, taking the deed as it stands, and the question as now pleaded, it would be a wide stretch to hold the clause above mentioned as an actual appointment or nomination of Miss K. Mercer to be heir in the estate, when the deed was not made *eo intuitu*, and even the estate itself is not named.

An estate cannot, by the law of Scotland, be settled by mere will. It requires a disposition or an obligation to dispoise; and if at any time words importing a mere *significatio voluntatis* have been sustained, it has only been in the exercise of reserved faculties, or in deeds of an accessory and relative nature. All this doctrine was fully discussed in the last decision of the cause between the Duke of Hamilton and Lord Douglas, upon the import of certain words in the deed of revocation, 1744. The Court found that this was no settlement of succession, and could not be the ground of any claim, which judgment was affirmed in the House of Lords, 29th March 1779,

complaining in health, but was not in law in *lecto ægritudine*. Anciently, the law was justly jealous of all deeds having the effect of altering the order of succession, contained in the investitures, and more particularly of those ex-

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(ante Vol. ii. p. 450). Vide also case of Douglas v. Earl of Morton, determined in the House of Lords, 21st Jan. 1773. (Vide ante Vol. ii. p. 605 et App. to Vol. iii.). The clause in the deed, No. 2, cannot be sustained as the exercise of any reserved power in another deed previously made and subsisting. Neither can it be sustained, as accessory to a deed which was not then executed, and never became effectual. It may be a good disposition of the subjects therein mentioned, but *quoad* the succession to the estate of Lethindy, the question is, If it can have effect, as it does not mean to dispose of that estate, but only takes for granted that this was done, or to be done, in some other deed, and does not even specify the estate of Lethindy, or any particular lands whatever, as contained in that other deed, though, at the same time, it is plain from other clauses that no other lands could be meant. Nor can the condition itself have effect against Catherine Mercer, unless she takes the estate, so that the case is attended with some difficulty; and it is doubted if the argument has yet been stated so fully as it might be, especially as the case of the Duke of Queensberry v. Sir William Douglas, decided in the House of Lords, 3d April 1783, (ante Vol. ii. p. 603,) has been overlooked, though it is the case that comes nearest to the present, and the judgment there given makes strongly in favour of Miss K. Mercer."

LORD ESKGROVE.—"The favour of the law is for the will of the defunct. It is enough that he lived a part of the last day."

LORD JUSTICE CLERK, (M'QUEEN).—"As to the rule, *Dies inceptus pro completo habetur in favorabilibus, &c.*, it is out of the question; for it only applies to the case where time is completed by years; and it is no great stretch to hold the last day of the year is completed. But no such rule applies where time is computed by days, e.g. Induciae of Summons, Aliment of Prisoners, &c.—hours do not enter into the computation, because they are not mentioned in the act."

LORD SWINTON.—"Of the same opinion. Suppose it had been one day."

LORD HENDERLAND.—"See Wright's History of the Jameses. The meaning of the Legislature is not to go into questions, but to take round periods."—"The Court sustain the objection of not having lived sixty days complete; and order counsel to be heard on the other point."

Interlocutor, 11th December 1793.

LORD PRESIDENT CAMPBELL.—"The deed of 21st February is merely an accessory deed, referring to that of the 22d February,

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executed *in lecto ægritudinis*. Accordingly, ever since the time of King William, c. 13, and the *Regiam Majestatem*, such deeds so executed were reducible at common law, if the party, at the time of executing them, had contracted that disease of which he afterwards died. The statute 1696, then qualified the common law rule of deathbed by adjecting the period of sixty days. To prove that the party is *in lecto ægritudinis*, is hence of importance; and in doing this, it will not be sufficient to show, that at the time he made the settlement he was in a precarious and declining state of health. Mere weakness, from old age, or other causes, will not do, because every man, after attaining

which was framed at the same time, though not executed till too late. The rule, *accessorium sequitur principale* applies. It is not a substantive deed, and does not even contain a will, or indication of a will, either express or implied, to give the succession to Miss Mercer, but only supposes that such will was then or immediately to exist. Supposing, however, it could be construed into an indication of will, and that such indication should be held as an actual will, it would not be sufficient, according to the case of Hamilton and Douglas, before referred to. *Titius heres esto* was good Roman law, but bad feudal law. The case of Judge Ross, observed in Lord Monboddo's information for Douglas, 12th March 1762, is nothing to the purpose. It is not said, he had any more heirs than his brother, and the superior confirmed the nomination by a charter. I am clear that the granter was on deathbed, no matter what the name of the disease was—physicians are often at a loss about that."

LORD ESKGROVE.—"The deed must be done *eo intuitu*. Had it been so, I could have held the signification of the will sufficient."

LORD JUSTICE CLERK, (M'QUEEN).—"The deed of 21st February is not a settlement by itself; and was not intended as such. But suppose it had said expressly, "who is hereby appointed my heir," it would not have been sufficient unless it had been in exercise of a reserved faculty. But truly it is a relative deed, referring to another which has become ineffectual, no matter whether upon deathbed or any other ground."

LORD SWINTON.—"Of the same opinion. Heritage can only be given *per verba de presenti*. *Titius heres esto* is no more than the mere making of a will."

LORD DREGHORN.—"Of same opinion as to first deed; but if it had contained nomination of her as heir, I would have doubted."

LORD MONBODDO.—"For adhering."

LORD ABERCROMBIE.—"For adhering."

LORD HENDERLAND.—"For altering."

Vide President Campbell's Session Papers, Vol. 71.

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a certain age, is subject to a certain degree of bodily infirmity and weakness. The decay, incident to all humanity, is not the disease law recognizes, but must be some regularly formed distemper tending to death. There is no proof of any such here. That the deceased was gradually declining in his health is true; that he had lived irregularly, and indulged in drinking to excess, was also true; but he laboured, at the time he executed these deeds, under no regularly formed disease. 2. But even supposing it were true, Mr. Mercer, when he executed the deed, had contracted the disease of which he afterwards died, Mr. Mercer, after executing the deed, lived the statutable period of sixty days, which fact alone validates the settlement. The deed being executed on 22d February, between seven and eight o'clock evening, and Mr. Mercer having died on 22d April, between ten and eleven at night, he thus lived sixty days after executing the deed, in terms of the act 1696, and *dies incæptus pro completo habetur*, according to the maxim in the civil law. 3. Although the deed of the 21st February contains no dispositive words, no words *de presenti*, giving the estate to the appellant, yet there was no necessity for a deed containing such words, in order to convey the estate to her, because there is no formula or fixed set of words known in the law of Scotland which a person must employ; all that is required is, a clear and explicit declaration of will. In the present case, it is impossible to deny that Mr. Mercer, in the deed 21st February, expressly declared his will, that the appellant should be his heir; and therefore, if he had never executed the deed of 22d February, still she was entitled to take the estate, assuming that declaration as equivalent to an obligation to convey. That, at all events, a clear obligation of this nature attaches where the testator has declared his intention as to his succession is clear, and that obligation devolves on his heirs so as to enable her to adjudge and complete her feudal right. This proposition is supported by the decisions, both here and in the House of Lords, in the case of *Douglas v. Earl of Morton*, 21st February 1773, and *Duke of Queensberry v. Sir William Douglas* in 1783.

Pleaded for the Respondents.—1. That in law it is sufficient that the granter is proved to have contracted the disease or sickness at the time of granting the deeds of which he afterwards dies. It is not necessary, according to the authorities, to prove mortal sickness, or any sickness affecting the brain. Sickness induced by a sore, a

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wound, or a bruise, if it confine him to the house, as in this case, will be sufficient. 2. The first deed challenged is dated 22d February. The act makes it incumbent to prove, "That the granter lived for the space of threescore days *after* making and granting thereof." But as the deceased, in this case, only lived thereafter fifty-nine days and three hours, he had not lived the statutory period required by the act to overcome the presumption of deathbed. And no recourse can be had to fictions in order to make out that a part of a day is equal to the whole, according to the maxim of the Roman law, *dies inceptus pro completo habetur*, because the statute expressly proves that the granter must survive threescore *days after* granting the same. 3. The deed of the 21st February, contains no dispositive words, no words *de presenti* giving the estate to the appellant, and without such expressions, heritage cannot be conveyed by the law of Scotland. Besides, the expression used does not import any obligation, or such words as import an obligation, sufficiently binding on the deceased's heir, so as to entitle the appellant to make up a feudal title. Nor can the deeds of the 21st and 22d, even if held as one settlement, avail her, because if the latter is cut off by the law of deathbed, she has no claim.

After hearing counsel for four days,

LORD THURLOW said, (LORD LOUGHBOROUGH concurring,)

"My LORDS,

"The *terminus a quo* mentioned in the act, is descriptive of a period of time, and synonymous with the date or day of the deed, which is indivisible, and *sixty days after* is descriptive of another and *subsequent* period, which begins when the first period is completed. The day of making the deed must therefore be excluded, so the maker only lived fifty-nine days of the period required. Had he seen the morning of the 60th, or subsequent day, it would have been sufficient; the rule of law above mentioned, (*dies inceptus pro completo habetur*,) then applying and making it unnecessary and improper to reckon by hours, or to inquire if the last day was completed."

Vide President Campbell's Session Papers, Vol. 71.

It was ordered and adjudged that the interlocutors be affirmed.

For Appellant, Sir J. Scott, Wm. Tait.

For Respondents, R. Dundas, W. Grant, W. Adam.

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ARCHIBALD and JAMES ROBERTSON & Co.
JOHN LAIRD,

Appellants ;
Respondent.

ROBERTSON
& CO.
v.
LAIRD.

House of Lords, 8th March 1796.

INSURANCE—ALTERATION OF VOYAGE.—Policy from Virginia to Rotterdam, with liberty to call at a port in England, only entitles to call at a port in England that may be within the due course of the voyage to Rotterdam, and not at any port in England, or at a port there which may be out of the due course of the voyage. The vessel having sailed from Virginia direct for Hull. Held this to be a different voyage from that insured.

The Messrs. Gemmell & Co. having sent their vessel, 'Fanny,' from Greenock to Virginia for a cargo of tobacco, they insured the voyage from Virginia with the appellants by the following order:—"Gentlemen, You will please insure in my
"favour, or whoever it may concern, £2000 ster. on tobacco
"on board the 'Fanny,' at and from her lading ports in Vir-
"ginia to Rotterdam, with liberty to call at a port in *Eng-*
"*land*, premium £2. 5s. per cent., valuing the tobacco at
"£10 sterling per hogshead." The appellants opened a policy of insurance, in which the risk is described in the following words: "Beginning the said adventure upon the said
"tobacco from the loading on board the 'Fanny' at her
"ports in Virginia, say in loading ports in Virginia, and to
"continue and endure until she shall arrive at *Rotterdam*,
"with leave to call at a port in *England*, and until the
"tobacco be there safely landed." Of this policy, the respondent Laird, underwrote £200 on account of his constituents, Messrs. Ritchie of Glasgow.

At the time this insurance was effected, it was not quite certain what kind of tobacco could be procured. The Dutch market was chiefly in view, for which the Rappahannock tobacco was suitable; but thereafter, having received advice that the Rappahannock kind could not be got, and that the cargo would consist of 112 hogsheads from York river, which is of a richer quality, and more suited to the English market, and 100 hhds. of Rappahannock, Messrs. Gemmell & Co. wrote the underwriters:—"Gentlemen,—By a letter
"I received yesterday from Virginia, it appears that my
"friends intended to send the 'Fanny' from Rappahannock
"river to York river, there to take on board part of the cargo
"of tobacco; and in that event she will proceed to Hull,

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“ in England, there to discharge her cargo. To this, I suppose, the underwriters have no objection, and I wish the tobacco shipped in the York river to be valued at £13 per hogshead. If the underwriters agree to this, please indorse the same on the back of the policy, for them to sign it; and you will please to insure £400 for these tobaccos, at 45s. per cent. as above.”

The appellants agreed to this, and underwrote the following indorsement, in order to be signed by all the underwriters:—“ *Greenock, 8th January 1789*, Mr. Gemmell having been advised by his friends in Virginia that they intended sending the within-mentioned brig ‘Fanny’ from the Rappahannock river to York river, there to take on board part of her cargo of tobaccos, and in that event the ‘Fanny’ will proceed to Hull in *England*, there to deliver her cargo, and not to Rotterdam; should the ‘Fanny’ therefore go to York river, we, the underwriters, on the within-mentioned tobacco, agree to stand the risk to Hull the same as if she were to proceed to Rotterdam; and we also agree to the York river tobacco being valued at £13 per hogshead.” The policy was sent by Messrs. Robertson, the appellants, to the respondent, Laird, that he might sign the indorsement. Their clerk called on him several times, but found him not in. After reading it over he carried it away. One of the appellants finding it lying on their desk, put it aside, imagining it was all signed. They had met Laird on the street, and spoken to him about it. He did not object to sign; but merely observed that the former premium was too low. It was never signed by him.

The “Fanny” sailed on her voyage to Hull, and while on the coast of Newfoundland, and still in the same tract she must have taken, if she had sailed for Rotterdam, she was lost.

Messrs. Gemmell made their demand for the loss. Laird, the respondent, refused to pay the sum underwrote, on the ground of deviation from the voyage originally insured, which was from Virginia to Rotterdam. But the appellants, seeing that his not signing the policy arose from their omission in not getting it signed, paid the amount, and raised action against Laird for his proportion. They obtained decree in absence, which being suspended, the Lord Ordinary refused the bill, which being reclaimed against, the Court, on two petitions, adhered; but appeal being presented to the House of Lords, this judgment was reversed;

“ and it was further ordered, that the cause be remitted
 “ back to the Court of Session in Scotland to pass the bill
 “ of suspension.”

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April 20, 1791.

Accordingly the discussion was gone into, which was entirely confined to the import of the original policy, it being contended that liberty to call at a port in England, was liberty to discharge the cargo at Hull, and the Lord Ordinary, of this date, pronounced this interlocutor :—“ Having
 “ considered this condescendence with answers, and the
 “ whole cause, finds, that a voyage insured from Virginia to
 “ Rotterdam, with liberty to call at a port in England, does
 “ only entitle the insured to call at such ports on the *Eng-*
 “ *lish* coast as lie in the track of the voyage, but *not* at a
 “ port which is so much out of the natural course of the
 “ voyage as Hull is, and therefore, suspends the letters *sim-*
 “ *pliciter*, and decerns.” On two reclaiming petitions to
 the whole Court, they adhered.

Nov. 14, 1792.

Dec. 4, 1792.

Jan. 15, 1793.

Another reclaiming petition was presented. In this the appellants contended, that by the original policy the Fanny had liberty to call and discharge at Hull. That liberty to call at a port, was liberty to discharge the cargo at that port; and that a voyage insured to Rotterdam, with liberty to call at *a port in England*, was liberty to call at any port in England, and consequently at Hull; and therefore, even on the import of the original policy, there was no deviation whatever.
 2. But even if there were, yet, under all the circumstances of the case, the respondent was equally bound by the indorsement as if he had actually subscribed it. The respondents maintained, that insurance on a voyage from Virginia to Rotterdam, with liberty to call at a port in *England*, did not mean liberty to call at the port of Hull, or at any port in England indefinitely, but only to call for advice, pilots, &c., at some one of the English ports in the channel, in the direct track from Virginia to Rotterdam; or, in other words, would import no more than a liberty to call at some port in England in the course of that voyage; that is, some port in the English channel, Plymouth, Falmouth, Dover, &c., at which last place, ships from America to Holland frequently and usually call, in order to get pilots for the coast of Holland. There being, therefore, a deviation from the voyage originally insured, he was not liable. And in regard to his being liable under the indorsement, as he never signed it, and never heard that he had been called on to sign it, there

1796. were no circumstances, and no principle to support such liability.

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June 26, 1793.
July 11, —

The Court still adhered.*

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—By the policy in question the “Fanny” had liberty to call at a port in England. It is not disputed that liberty to call at a port, implies liberty to discharge at that port. It consequently follows from this, that a voyage insured from Virginia to Rotterdam, with liberty to call at a port in England, gives leave to carry the cargo either to England or to Rotterdam. This agrees with the views of parties at the time of insurance. The quality of the tobacco to be shipped was not then ascertained, and the vessel’s alternate destination either to the one port or the other, depended upon the quality of tobacco that could be procured for shipment in the Virginia market, and accordingly the policy was made out to meet either event. The policy was therefore an alternative policy, and there would have been no use for applying for the indorsement, had it not been that the assured wished to change the value of the tobacco from £10 per hogshead to £13, in consequence of a higher priced tobacco being shipped. A ship loaded with tobacco by act of parliament, can call at no port without discharging her cargo there, which further strengthens the respondents’ proposition, that a vessel insured from Virginia to Rotterdam, with liberty to call at a port in England, must necessarily mean any port in England at which the tobacco could by law be imported, and that the leave to call must not only mean some of these tobacco ports, but also to discharge there her cargo. Besides, the vessel being lost when in the direct course both for Hull and for Rotterdam, and be-

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—“This is clearly a different voyage. The Hovering laws (act 25 Geo., c. lxxxi., § 48) cannot affect the question. Besides, there is no relevant fact offered to be proved, and the new policy was never agreed to. It is not a case of deviation, but of alteration.”

LORD SWINTON.—“It is a case of alteration. Even a shortening of the voyage is an alteration. There may be less preparation, difference in provisions, &c.”

LORD CRAIG.—“I think the interlocutor right. It was a different voyage altogether.”

fore she had reached the dividing point, the insured ought to recover.

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Pleaded for the Respondent.—The voyage in which the vessel was lost, was different from that described in the policy. According to the policy, the vessel was to proceed from Virginia, on a voyage to Rotterdam, which was there mentioned as the port of delivery; but she actually cleared out, and was proceeding, not to Rotterdam, but to Hull, as the port of delivery, when she was lost. The voyage, therefore, was changed, and unless it can be maintained that the two voyages were substantially the same, there is no ground for holding the respondent liable, as the deviation entirely frees him. And if he is not bound by the original policy signed by him, it follows that he is not bound by the indorsement, which was never signed by him, and which described a different voyage. The fact of the insured obtaining this indorsement, was the strongest evidence of their understanding as to the voyage, and of its being a deviation, else why apply for leave to call at Hull and discharge there, if he believed he had liberty already by the original policy to call there? A voyage from Virginia to Rotterdam, with liberty to call at a port in England, means only a port in the usual course of the voyage insured, and cannot be construed to mean a port entirely out of that course, but such a port only in England as the ship may pass direct on her course from Virginia to Rotterdam, of which there were several, and one tobacco port (Cowes). That liberty to call at a port in England, is not a leave co-extensive with liberty to call at *any* port in England, the former expression being more limited, and the latter general, and therefore, there being deviation, the respondent is free.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *Sir J. Scott, Wm. Grant.*

For Respondent, *T. Erskine, W. Adam.*

1796.

<p>OMMANNEY, &c. v. DOUGLAS, &c.</p>	<p>EDWARD OMMANNEY of Bloomsbury Square, in the County of Middlesex, and JOHN PAGE, trustees of Sir Charles Douglas, Bart.,</p>	}	Appellants;
<p>MRS. LYDIA MARIANA DOUGLAS OF BINGHAM, and RICHARD BINGHAM, her Husband, residing at Gosport, and their Attorney,</p>		}	Respondents.

House of Lords, 15th March 1796.

WILL—CONDITION CONTRA LIBERTATEM MATRIMONII—DOMICILE.—
 (1). A Scotchman by birth, residing in England, executed a will in the English form, leaving the residue of his estate to his younger children, equally among them. The respondent, his eldest daughter, having formed an attachment to a person whom she was on the eve of marrying against her father's will, he executed a codicil, declaring that if she were so married to that person, she should not be entitled to her share of the residue of his estate. They were married. Held, that this was a condition *contra libertatem matrimonii*, and not to be regarded. (2). Sir Charles Douglas, the testator, had left Scotland at 12 years of age, and entered the navy. He had been all his life in various services, and latterly in the British navy. He had a house at Gosport, where he most commonly resided when at home. He owned two houses at Edinburgh, and sometimes visited Scotland. The last time he staid ten months with his sister at Olive Bank. Having thereafter received the command of the fleet at Halifax, before leaving, he took a hurried visit to his sister and children in Scotland, where, two days after his arrival, he died of a fit of apoplexy. The question was, Whether England or Scotland was to be held his domicile, as applicable to the rights under his will? Held, reversing the judgment of the Court of Session, that England was the domicile of the deceased, and consequently, that the first interlocutor regarding the condition contained in the deceased's codicil, fell to be reversed, as the law of England, and not of Scotland fell to be applied, and that the condition in the codicil was not unlawful, but to be taken as a revocation of his former bequest to his daughter.

The late Sir Charles Douglas, then residing in England, executed a will in the English form, bequeathing his whole real and personal estate to the appellants, as trustees for the purpose of providing provisions to his wife, and to his eldest son, and the residue to be divided equally among his

younger children, with £50 additional to the respondent, 1796.
 Lydia Mariana Douglas, his eldest daughter. His property
 consisted of £15,000 of stock in the public funds, and ^{OMMANNEY & C.}
 £2000 secured by a deed, executed by the executors of Mr. ^{v.} BINGHAM, & C.
 Cruikshanks, a gentleman in England, by which they de-
 clared they held a bond of Mr. Gavin of Langton, in Scot-
 land, for £5000, in trust to the extent of £2000, for Sir
 Charles Douglas, and two flats of a house in the Canongate
 of Edinburgh.

His eldest daughter, the respondent, having displeased
 him in her matrimonial alliance, he, on the 11th October
 1788, added a codicil or will, whereby setting forth the
 cause of displeasure, and the share left her by the above
 settlement, he declares, that "if my said daughter Lydia
 " Mariana Douglas hath already married the said Richard
 " Bingham, son of the said *John* Moody Bingham, then, and
 " in such case or event, I, the said Charles Douglas, do
 " hereby declare my will and intention to be, that my said
 " daughter Lydia Mariana Douglas, or such her husband,
 " his or her heirs, executors or administrators, shall not, at
 " any time or times, after such marriage taking place, be
 " entitled to the share intended to be given to her by my
 " said will." A disposition applicable to the Scotch pro-
 perty, was at same time executed in the Scotch form.

The parties got married in November thereafter, against
 the express prohibition of Sir Charles. He died in March 1789.
 thereafter, without ever seeing or being reconciled to his
 daughter, and without revoking the codicil.

The daughter and her husband instituted the present ac-
 tion of reduction in Scotland, calling for production of the
 two last deeds, that the same might be reduced.

The chief ground insisted on in the first branch of the case
 was, that the condition as to her marriage being *contra liber-*
tatem matrimonii, and such as Sir Charles could not legally
 impose, was of no binding effect in law, to deprive her of
 her share of the residue of the deceased's estate.

Informations were ordered. The appellants, on the one
 hand, contended, That in disputing the legality of the con-
 dition prescribed by the testator, the respondents con-
 founded two cases essentially different: When a father in-
 sists that his child shall marry a particular person, or a
 member of a particular family, he certainly exceeds the
 limits of that proper and lawful authority which every pa-
 rent ought to possess. In the same manner, when a parent

1796. insists that a child shall not marry at all, he exceeds the bounds
 ——— and limits of parental authority. But these cases do not apply to
 OMMANKEY, & C. the present question, because, although a father be not entitled
 v. either to prevent his daughter from marrying, or oblige her
 BINGHAM, & C. to marry any particular person, it does not follow that he
 is not entitled to impose a negative to the daughter's choice,
 because such a power falls legitimately within the parental
 authority, of which it would be both highly inexpedient
 and dangerous to deprive a father. A father may have good
 reasons for withholding his consent; and if he can withhold
 his consent, it cannot be illegal, or *contra bonos mores*, or
contra libertatem matrimonii, to declare that if she married
 Mr. Bingham, her share should go to her other brothers and
 sisters. The father has power to disinherit any of his chil-
 dren. And it is no answer to this to say, that the respondents
 would not have married, had they known of these conditions,
 because, in point of fact, they were duly warned that if they
 married, that they were acting in direct opposition to Sir Charles'
 injunctions. In answer to this, it was stated by the respondents,
 that at first Sir Charles was agreeable to the match, but after-
 wards refused his consent. The match was in no view unsuit-
 able; and the conditions in the settlement were therefore un-
 reasonable. It was further contended, that the condition of
 marrying Richard Bingham, son of John Moody Bingham,
 did not apply to the circumstances which actually took
 place, as she had not married Richard son of *John*, but
 Richard son of Isaac Moody Bingham, and therefore the
 condition did not apply. The intention obviously was clear;
 but intention was not sufficient, because, applying the strict
 rule to such deeds of an unfavourable nature, which are
strictissimi juris, the intention will not supply the want of
 suitable words, which must be express and positive. Here
 there was no more than a declaration in this codicil, of an in-
 tention to alter, if she were then or afterwards married to
 Mr. Bingham. The marriage took place thereafter, but he
 died without altering, and so without putting that intention
 into effect. But assuming the codicil to contain a sufficient
 alteration by itself, then as it was attendant on her marrying
 a particular person against his will, the condition ought to
 be held as void, *contra libertatem matrimonii*.

On report of the Lord Ordinary, the Court sustained the
 reasons of reduction, of the irritant condition contained in
 the codicil libelled, and found the pursuer entitled to her
 whole provisions, as originally destined for her, in the same

way as if no such condition had ever been inserted, and as if she had married with his consent.* 1796.

It was at this stage that the point of Sir Charles Douglas' domicile suggested itself upon the question, whether his estate was to be adjudged by the law of England, or by the law of Scotland, and whether the above interlocutor could only affect the small portion of the estate in Scotland. OXMANNEY, & C. v. BINGHAM, & C.

By the agreement of parties, it was arranged to discuss this point in the present case, as to the whole succession on the question, Whether England or Scotland was to be considered as the domicile of the late Sir Charles Douglas?

He was born in Scotland, being the younger son of Mr. Douglas of Finglassie, Fifeshire. When twelve years of age he entered into the *British* navy, where he remained on board ship, sailing from place to place, for seven years. Being paid off, he entered into the Dutch service, where he continued for several years, and had he died at this time, his 1741.

* Opinions of Judges:

Interlocutor 14th February, 1792.

LORD PRESIDENT CAMPBELL.—“ This is a condition *contra libertatem matrimonii*. The case of *Hay v. Wood*, (Mor. p. 2982), is not similar, as the bond was there considered to be merely gratuitous. The match is admitted to be suitable, and there is a good deal, likewise, in the objection to the words used, (*John for Isaac*); but as it is only a part of the *description*, which may be supplied by evidence, this objection might be got over. See case of *Pitsligo*, (ante vol. i. p. 482), and the case of *Strathallen*, in the House of Lords. The condition here is not against marrying in general, but only against marrying a certain person. It may be doubted if this be unlawful. See Voet, lib. 28, tit. 9, § 12. But it is not said that any notice of this condition was given to her, and, in fact, she had married Mr. Bingham before she was aware of the consequence. The condition, therefore, if enforced, will have a very penal and unjust effect against her. See Bankton, vol. i. p. 114, and Stair, 23d Feb. 1681, Hamilton, (p. 865 et Mor. p. 2970).

In England, it is believed, more effect is given to those conditions than with us, yet a Court of Equity will relieve against too severe a condition, or hold it to be adjected *in terrorem* only, especially if it be of the nature of a *subsequent* or forfeiting clause. See Abridgment of Cases in Equity, p. 212, vol. ii.”

LORD HENDERLAND.—“ This is a condition *contra libertatem matrimonii*, and not to be regarded.”

LORD ESKGROVE.—“ Of the same opinion.”

Court found “ That she has right to her provisions.”

1796. succession would have been regulated by the law of Holland. In 1754 he returned to the *British* service. In 1759 he married a Dutch lady. After this he remained sometimes in London, and sometimes in other parts of England, as suited the station of his ship. In 1763 he left the British service, and entered into that of Russia, where he remained for two years, his wife and family living at Amsterdam. In 1766 he left that service, and again entered the British service, having got the command of a frigate on the Scotch station, where he remained, chiefly at Leith, till 1769. His next station was Lapland. His family, on his leaving for that coast, going to Amsterdam. On his return to England, he was, in 1771, appointed commander of the *St. Albans*, and ordered to the Windward Island station. He married there a second time, and returned to Spithead station in 1772. He rented a house at Gosport from that period till 1774, having the command of a guard ship. His second wife gave birth to her first child here. He visited Scotland, where she was delivered of her second child. In 1775 he returned to England, with his wife and two children. He was then appointed to the command of the "*Isis*," and sailed with her for Quebec, where he highly distinguished himself, and was in consequence, on his return, created a Baronet. From 1777 till 1779 he had the command of several ships. In August of this year, his wife died in Gosport, where for three years and a half she had resided during his absence. He was left with three young children, who were committed to the care of Mrs. Baillie, his sister, in Scotland. On the death of his second wife, his house in Gosport was given up; but in a year after, having married a third time a lady of Gosport, this house was again retaken, where his wife and family remained for three years, Sir Charles himself being sometimes absent on service. He sublet his house, furnished, at Gosport in 1783, on leaving for the Halifax station, to which he had been appointed. He returned in 1785, visited Scotland for a short time, returned to London, then visited Amsterdam, where his daughter, Mrs. Bingham was, and returned with her to England, contemplating a visit with her among his friends in Scotland. He wrote his sister in November 1786, on setting out on this visit: "On Tuesday three hair trunks and a large round " hat case, belonging to my ladies, went from the White " Horse in Cripplegate, in the Edinburgh waggon; and yes- " terday, from the same place, and by a similar conveyance,

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“ were sent to the northward a large Dutch basket, with a
 “ lock hanging to it, two knife cases, and a middle sized square
 “ mahogany case, belonging to the same owners, with whom,
 “ and Charles of Venlo, (the son of his elder brother, who
 “ had died in the Dutch service), I set out on Saturday or
 “ Monday next, and shall not travel very fast. *Be pleased to ob-*
 “ *serve, that I do not engage to build my tabernacle in Scotland,*
 “ *and that, if it should sometime hence prove convenient to me to*
 “ *establish myself elsewhere, because of service or otherwise, I*
 “ shall probably remove the whole of my family, considering,
 “ in such eventual case, my nephew aforesaid, as a very
 “ precious member thereof.” He remained with his sister,
 Mrs. Baillie, at Olive Bank, for ten months. In 1789 he
 again got the command on the Halifax station, an appoint-
 ment of three years’ continuance. At this time his wife
 and family were in London. His house in Gosport still
 kept up, but let furnished, with all his pictures and furni-
 ture in it. Previous to setting out to his command, he took
 a hurried journey to Scotland, to visit his sister, and take
 leave of his children left under her care. Two days after
 his arrival in Edinburgh, he died suddenly of apoplexy.

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The respondents argued upon the maxim, that there was
 a presumption for the *domicilium originis*, unless the con-
 trary be proved, and the party has permanently fixed his
 domicile elsewhere, “ *Originem in eo habere prerogativam*
præ domicilio, quod pro origine, presumatur, donec probetur
contrarium alibi constitutum esse domicilium, qua accedens
naturale præsertim præsumatur in eodem statu, perstare.”
 From the above detail of Sir Charles’ changeful life, it was
 clear either that he had returned to his original domicile
 previous to his death, or, that having a domicile nowhere,
 it must in law be held to be in his native country. The
 appellants, on the other hand, contended that the *forum*
originis was gone on entering the Dutch service, and mar-
 rying in Holland. It was again gone on leaving that ser-
 vice, and establishing himself in Russia. That his residence
 for the most part after that was at Gosport, where he took
 a house, furnished it, and where he always resided when at
 home with his family.

Brunnemanni,
 Com. in Cod.
 L. 10, T. 38,
 L. Filios.

Of this date, the Court found, “ In respect Sir Charles Dec. 17, 1793.
 “ Douglas was born in *Scotland*, and occasionally had a do-
 “ micile there, that he died in Scotland, where some of his
 “ children were boarded, and that he had not at the time
 “ a domicile any where else : The Lords find his succession

1796. "falls to be regulated by the law of Scotland." * To this, on reclaiming petition, they adhered.

OMMANNEY, & C. v. BINGHAM, & C. Feb. 7, 1794. Against these interlocutors the present appeal was brought. *Pleaded for the Appellants*.—1st, The reasons stated by the Court of Session for holding Sir Charles' domicile to be in Scotland, are, 1st, That he was born there; 2d, That he occasionally had a domicile there; and 3d, that he died there, where some of his family resided. In regard to the first, undoubtedly the *forum originis* of Sir Charles was in Scotland. Had he been a wanderer over the world, without wife, family, household, permanent relation or residence of any sort, the *forum originis* must still subsist. But nothing can be more clear and settled, than that the *forum originis* must give way to a subsequent domestic establishment. Sir Charles had formed permanent relations. He had arrived at distinction and honours by a regular course of service in the British navy; had been three times married, had children, household establishments, and considerable property; so that Sir Charles cannot be viewed to have been a wanderer, without any permanent habitation. His house at Gosport was his home, where he had resided for nearly twelve years, either by himself or family, and which was possessed up to his death, although let out furnished. In the second place, he had no occasional domicile in Scotland. For forty-eight years he had only visited Scotland four times, On the third occasion he had staid ten months, but this was not sufficient; and is entirely explained away by the letter to

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—"This is a question upon a will, and whether the law of England or Scotland is to be the rule. The original question was not understood to depend on any municipal rule of the law of Scotland, but was decided upon a general principle of law. (Vide first interlocutor). As to the question now stated, it cannot be said that Sir Charles Douglas had a fixed domicile any where at the period recently before his death. But Scotland was the place of his nativity, where he lived till twelve years of age, where he occasionally resided afterwards, where a part of his family also resided, and where *he died*; and as it is admitted that he had then no actual home, or fixed establishment elsewhere, the question is, Whether the above circumstances are not sufficient to constitute a domicile in Scotland? I think that they are sufficient to hold that his domicile was in Scotland. Vide the case of *Lorimer v. Mortimer*, 1st Feb. 1770."—Vide President Campbell's Session Papers, 72.

Mrs. Bailie. On the fourth visit he died, but the mere circumstance of these temporary visits, attended as they were by no fact which showed an intention on the part of Sir Charles to take up there his final residence, is insufficient. And his death there cannot, in the next place, form any ground by itself, the more especially as he at the time had a domicile elsewhere, because at that moment he was tenant of a house in Gosport, where his furniture and pictures remained, and which was at the time of his death his home, and England, therefore, his domicile.

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II. But whatever be the decision on this point, still the law of Scotland as to the other point cannot stand. The testator had a power to make his will and to alter it. He had power to disinherit any particular child; and, in like manner, he had power of bequeathing the daughter's share in such terms as that, if she should marry a particular person, she should get nothing, and her share devolve on her brothers and sisters. Such a condition is not a restraint on marriage, and consequently neither illegal, nor *contra bonos mores*. It may be a hard condition, but there may be urgent reasons inducing the father, in the due exercise of his parental power, for imposing it. If good in the case of a stranger, it ought, for this reason, to be good where a parent imposes it; and the cases referred to, relate either to the father imposing a condition that his daughter should marry a particular person, with consent of his trustees.

Pleaded for the Respondents.—1. Having reference to the whole history and career of Sir Charles Douglas' life, it is clearly established that he must be considered as domiciled in Scotland at the time of his death. He was born and educated there. His constant residence there, except in so far as this was interrupted by his professional pursuits, which were of a nature not likely to constitute a domicile elsewhere. The case of a sailor or soldier in the service of their country, is different from that of merchants, seeking their fortune in another country. The former are only absent on temporary service, and must be held to be domiciled in the country to which they originally belonged. They are in the same category with ambassadors, &c., who never lose their original domicile, although resident in foreign courts. Accordingly, Sir Charles had his domicile in his native country. There was no final determination taken to abandon that country; his duty led him away into active scenes, but he always kept it in view. The house at Gos-

1796. port was only taken when he took the guardship command,
 ——— just to serve him, just in the same way as he took lodgings
 OMMANNEY, & C. in Leith, when he was on the Scotch station, but he was
 v. then attached to his ship, and ready to be called away. He
 BINGHAM, & C. had, moreover, on frequent occasions, stated his desire to
 lay his bones in Scotland, among his ancestors. 2. In re-
 gard to the alteration of her father's will, there could be
 nothing more firmly established in the law of Scotland, that
 such conditions and restraints on marriage are void, and of
 no effect in depriving the daughter of her share in the de-
 ceased's succession. Besides, the condition strictly, does
 not apply, because she has not married Richard Bingham
 son of *John* Moody Bingham, but Richard son of *Isaac*
 Moody Bingham, which, though a critical objection, yet in
 the circumstances of this case, should be strictly interpreted.

LORD CHANCELLOR LOUGHBOROUGH.

“ MY LORDS,

“ The question now to be determined by your Lordships is pecu-
 liarly interesting, and every argument of compassion, everything
 which tends to call forth the higher sentiments and feelings, press
 upon your Lordships for every possible favour to the respondents; for
 it is more than probable that the resentment of the father, on ac-
 count of this lady's rash conduct, would, under the real circumstances
 of the case, as they afterwards appeared, have been softened and
 appeased, and that his known good nature would have induced him
 to pardon her indiscretion, and to annul the codicil to his will, if, to
 the great loss of his country, as well as his family, he had not been
 carried off suddenly and unexpectedly. But nothing can be so dan-
 gerous as for a court of justice to suffer itself to be led away by com-
 passion, instead of being guided by the general rules laid down as
 the law of the land; and of applying, in the cases before it, that law
 biased by passion, or warped by personal consideration.

“ In the present case, there are two interlocutors brought under
 our review, in their natures essentially different from each other.

“ The first is on a question of pure Scotch law, by which the
 Court of Session have declared that the codicil executed by Sir
 Charles Douglas can have no effect, as being at variance with the
 law of Scotland. But when this question was before them, unfor-
 tunately the Court overlooked another and previous question, which,
 therefore, forms the subject of their second interlocutor, and that is,
 Whether Sir George Douglas was domiciled in this country, or in
 Scotland? The question here alluded to, has no reference to the
 particular law of Scotland, it must be decided on principles of general
 law; because, it is now admitted, not merely in both parts of Great

Britain. but in all, at least most of the civilized countries in Europe, that it is the place of a man's domicile which must give the rule for the distribution of his personal property.

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“Formerly, there seems to have existed in the courts of Scotland, and in other parts of Europe, a kind of controversy in regard to the locality of personal property, as if its distribution was dependent upon this consideration. But the determination of your Lordships, which have been acquiesced in and followed in Scotland, have now settled it as law, that the distribution of an intestate's personal estate, or the construction or effect of a will, must be governed by the law of the place where the intestate, or the testator, had his last domicile. If, then, it shall be decided, in the present case, that Sir Charles Douglas died a domiciled Englishman, it is immaterial (as to these parties) whether the judgment of the Court of Session be right or wrong on the other question, which depends upon the law of Scotland.

“In viewing the life of the late Sir Charles Douglas, your Lordships will find it a life of bustle and adventure. The scenes of activity in which he was almost constantly engaged, and in the course of which he distinguished himself so remarkably for courage and good conduct, afforded him but little opportunity to settle long in any particular place. Independent of the services he rendered to this country, your lordships will find him in the employment of two courts, the allies of Britain, Holland and Russia. In the Empress's service he was entrusted with a very high command, which did not continue, however, for any great length of time; but, in the service of Holland, he continued for a much longer period,—three or four years—and it has been argued that he acquired a domicile in each of these countries; a question which I am not now called upon to discuss. At his return home, in both cases, he was employed in our own service, and your Lordships will perceive that he was much employed, and in various parts of the world; that he was exceedingly active at all times; and that, when at home on shore, he was so eagerly engaged in the course and pursuit of his profession, that he did not settle anywhere, so as to strike root very deeply, which at first sight makes it difficult to say where he was domiciled. But, upon a more minute investigation of the circumstances in his life, I cannot approve of the judgment of the Court of Session; and I shall now examine into the reasons on which the judgment is founded, for the purpose of showing on what grounds I am not satisfied, in doing which, I shall take the inverse order in which these reasons are stated in the interlocutor.

“By this arrangement, then, the first circumstance is, that he died in Scotland, where some of his children were boarded. This, however, of some of his children being boarded in Scotland, is not mentioned as the *ratio decidendi*, but is thrown in along with the circumstances of his death. On that circumstance, however, no stress can be laid; for nothing is more clear, than that residence, purely temporary,

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has no effect whatever in the creation of a domicile. Precisely of this kind was the residence of Sir Charles Douglas in Scotland at the period of his death. He had been appointed to the command on a foreign station, and went down to Scotland to take leave of such of his children as happened to be there, with all the hurry which was the necessary consequence of a speedy and immediate return. When he set out for Scotland, he was actually appointed. He had, therefore, so very short a time to continue, that it is impossible to say or imagine that he had the remotest thought of settling or remaining in Scotland, at the time when unfortunately his life was closed. The time he had to spend in Scotland at that period was limited, his stay was circumscribed, an immediate return was indispensably requisite; and, lastly, the object he had in view in this journey to Scotland was definable, and is defined. He was there, therefore, without idea or intention to remain, and consequently his last visit to Scotland, and unexpected death, can have no influence on the point of his domicile.

“ The next circumstance is, that occasionally he had a domicile in Scotland. But this is rather an inaccuracy, for when had he a domicile in Scotland? That is, at what period was he fixed and settled there for life, or, as the word has been explained, for a perpetuity, meaning a continuation of time, or with an intention to remain? Unless it can be shown that he had been settled in Scotland with such an *animus*, he can never be said to have had a domicile in that country. For there is no such thing as an occasional domicile. It is the general habit and tenor of a man's life which must be looked to; and in no case is it possible for a man to be so situated as to admit the idea of anything like two domiciles for the purpose of succession, unless his time were so arranged as to be equally and statedly divided betwixt two countries, in each of which his residence had exactly the same appearance of permanency as in the other,—a case which could hardly occur, for some shade of difference would in general appear, giving a clearer character of permanency, or established settlement to one of the situations than to the other. But, if such a case as I have now supposed, were brought before us, there might be some difficulty in coming to the true conclusion. It is sufficient, however, here to say, that such is by no means the present case.

“ The last, or rather the first consideration in the interlocutor is, *That Sir Charles Douglas was born in Scotland.* This may be insisted upon, as affording some little degree of argument; but the judges in Scotland were all agreed in opinion that birth is the slightest circumstance in the formation of the domicile of a person who has arrived at the years of Sir Charles Douglas. If it could be made out that in no part of his life the person made choice of any country as the site of his domicile, his birth would undoubtedly fix it in the place of his nativity. But, where a man's conduct and general habits

have settled him elsewhere, his having been born in another country becomes of no consideration, and cannot have the smallest effect in regard to his domicile.

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“ Upon the case of Sir Charles Douglas, my opinion is, that he fixed himself in this part of the United Kingdom. I have no hesitation in declaring it as my further opinion, that it does not detract from the idea of his being domiciled in England, that his professional habits and conveniency, joined to his hopes of preferment, induced him to fix and settle here in preference to Scotland. As I have already observed, Sir Charles Douglas could not be much at home ; but when he had any leisure, any opportunity of living on shore, where was it most likely, where most expedient that he should be found ? At a great seaport, certainly ; at Gosport, or in its neighbourhood, and it appears to me, that an officer so eager about his profession, and of so much naval ingenuity as Sir Charles Douglas possessed, (for it is well known that he was the author of some great improvements), would have chosen any other situation. Sir Charles Douglas was a public man, and one may therefore speak of him. I will then take it upon me to say, that his mind and inclinations were so attached to his profession, and his zeal and ingenuity for the improvement of the navy so great, that I am convinced he could not have been at rest for any great length of time in any situation, but where he had an opportunity of showing, and putting these in practice.

“ I have mentioned the probability that Sir Charles Douglas would take up his residence in this country ; and, as a matter of fact, he was domiciled at Gosport, that is, his family and establishment were there for seven years successively, from the year 1776, even when service called him personally to another quarter. At one period he had a guardship at the Medway. Still, however, his house and home continued at Gosport ; and the general habits of life, and his conduct throughout, all tend to confirm the proposition, that his domicile was by choice in England, and consequently that he must be considered as an Englishman.

“ I shall not detain your Lordships with a discussion of the effect of the visit to his sister in 1786 ; but content myself with observing, that during the whole space of time which he remained in Scotland he had no house of his own—was never master of a family ; and that, previous to his departure for Scotland, he guards his sister against entertaining any idea that it was his intention to be more than a visitor, or to take up any settled residence in Scotland.

“ Your Lordships will at once see, that it is a very material circumstance, and takes away much of the favour of the case from the respondents, that a man, considering himself an inhabitant of a particular country, and, acting upon that idea, has made a regular settlement of his affairs, agreeably to the laws of that country ; and yet that he should be disappointed in his intention, and the disposition he had made be defeated, on the idea and supposition that his suc-

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cession must be governed by the law of another country where he happened to be born ; and that such his settlement, not being agreeable to this latter law, shall be considered as good for nothing ; that he shall be held as a person who has died intestate, leaving it to that law to make a will for him. In the case of Sir Charles Douglas, this hardship is particularly apparent ; for, if we look to the will which he executed, and the subsequent codicil, it is impossible to conceive that he considered himself in the character of a Scotchman, having his property subject to the rules established by the law of Scotland. The opposite conclusion presents itself with irresistible force. His will is an English will, in every sense of the word ; and it is therefore an obvious conclusion, that, in his opinion, the law of England was to dispose of his property.

“ But, it is urged, that he also made a will, or disposition in the Scotch form, of his property in Scotland. He did so, and he was well advised when he did so, because that property being *heritable*, could only be disposed of by those forms prescribed by the law of Scotland. But what was the object of this disposition ? It was to direct, that his whole property in Scotland should be *sold*, that it might be converted into personal property, and distributed and disposed of in the same manner as his property in England. Under these circumstances, it is impossible to conceive that Sir Charles Douglas had the most distant idea that his will would be set aside by his children, because, by the law of Scotland, they are entitled to legitim ; or, by his wife, who probably had no settlement by covenant, because she, by the same law, might claim her thirds. It appears, on the contrary, to be very evident, that Sir Charles Douglas, looking to the laws of this country as the only medium by which his intention was to be carried into effect, never dreamed of these claims ; and the hardship would rather be, that his disposition should not take effect in consequence of his long residence in England. In my opinion, therefore, your Lordships ought to declare that the succession of Sir Charles Douglas must be regulated by the law of England.

“ Should your Lordships be of this opinion, it is then unnecessary to enter into the other question, because your judgment attaches on all the property, wherever situated, and Sir Charles Douglas’ executors will be authorised to act as his personal representatives and executors in Scotland, under the authority of the Court of Session : the effect of which will be, that the respondent, Mrs. Bingham, unfortunately will, by means of the codicil, lose the benefit which was intended for her by the will of her father. At the same time, it may not be improper to say a few words on the other question, even though it shall be declared that Sir Charles had his domicile in this country ; in which opinion, the noble and learned Lord (Lord Thurlow), who attended most of the pleadings, perfectly agrees with me ; while, at the same time, he entertains, as I do, a very great degree

of doubt, whether, by the law of Scotland, the first interlocutor of the Court of Session can possibly be supported. 1796.

“ I have looked with care into the text writers on the Scotch law, without being able to discover any positive declaration, or opinion, different from what is to be met with in the law of this country. OMMANNEY, & C.
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“ Stair treats only of bonds of provision, which are materially different from deeds of a testamentary nature ; for the former constituted the provision a *debt* against the estate, subject, no doubt, to a certain condition, the legal validity of which depended upon its object and tendency. If it be a general restraint, it is said to be *contra libertatem matrimonii*, and, on that account, null. If it forces the grantee to marry a *particular person*, it is then termed *contra pietatem* ; the father has exceeded his authority, and for this reason the provision is sustained, while the condition is rejected.

“ Erskine speaks of bonds with a condition, impossible to be performed, in which case he lays it down, that the debt is constituted ; while the condition being impossible, the bond is taken as a pure bond. Or if the condition be such as the father ought not to impose, the debt in this case is likewise sustained, without regard to the condition, because it is an improper one.

“ Then, as for their cases, there are several where the consent of particular persons, such as trustees, was declared to be necessary previous to marriage ; but there is not a single case, in which it has been found, that a father might not impose upon his child a reasonable condition. I shall just add, on the subject of these bonds of provision, that they do not require delivery, but are perfectly valid, and the provisions contained in them become an existing debt, if found in the father’s repositories at his death.

“ But there is no affinity betwixt these cases and the present. A father, in Scotland, can disinherit his child ; and certainly he can, with at least equal propriety, impose upon such child a condition in itself neither unreasonable nor improper. But, in fact, this is not properly the case of a condition, but rather that of a revocation of the bequest in a will by a subsequent codicil. The question then to be considered is, Whether the legacy revoked by the codicil has been and ought to be forfeited ? The legacy, given by Sir Charles in his will, is recalled if his daughter had married, or should marry, the respondent, or any of his brothers ; that is, the legacy continues in force, but the codicil revokes it *sub modo*, if a certain event had happened, or should happen ; and there could be nothing unreasonable in this.

“ The event had happened ; and on the death of Sir Charles, his will was found to contain the legacy to his daughter, but the codicil was found to revoke it. There is no affinity betwixt this, and those cases in which the Court of Session has annulled the condition annexed to the *gift*, or existing debt.

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“ I feel much diffidence, however, in delivering this opinion. But the reversal of the interlocutor, on the legality of the condition, does not depend upon it. It is the declaration that Sir Charles Douglas was a domiciled Englishman which governs the case; that depends upon principles of general law; and the reversal of the first interlocutor is a necessary consequence of the reversal of the second.”

On the motion of the Lord Chancellor, this judgment was pronounced, (18th March, 1796).

It is ordered and adjudged, that the said interlocutors of the 17th December 1793 and the 17th February 1794, complained of in the said appeal, be, and the same are hereby reversed; and it is hereby declared that the succession to the property of Sir Charles Douglas be regulated by the law of England: And it is further ordered and adjudged, that the interlocutor of the 17th of February 1792, also complained of in the said appeal, be, and the same is hereby reversed.

For Appellants, *Wm. Grant, Thomas Macdonald.*
 For Respondents, *Sir J. Scott, Wm Battiner.*

JOHN STEIN, Distiller at Canonmills,	-	<i>Appellant;</i>
THOMAS STEWART and JAMES SOMMERVAIL	}	<i>Respondents.</i>
& Co., Merchants, Leith,		

House of Lords, 18th April 1796.

CONTRACT OF SALE — PAYMENT — BILLS. — A contract for the sale of spirits, to be delivered at stated periods, and stipulating that “ Bills at three months” should be granted for each delivery. The question was, Whether, from the stipulation of “ bills at three months,” and other correspondence between the parties, the seller was entitled to discountable bills, or bills that would produce ready cash at the banks; and on failure to give such bills, whether he was entitled to stop the contract; Held, in the Court of Session, That, as by the said contract he had received the guarantee of a party, he could demand nothing farther, and was bound to perform his contract, although he offered to prove that the

alleged guarantees were the principals in the purchase,—that they had alone granted bills for the spirits as principal purchasers—that they had held out that William Allan, banker, was also concerned in the purchase as partner, and that he would discount the bills. That Mr. Allan at first discounted, but latterly refused to discount their bills, because they had dishonoured previous bills so discounted; and that Mr. Allan, upon inquiry, declared that he was not a partner of the concern, and that he could not obtain the bills discounted in any other bank, and that these parties had assured him, that if Mr. Allan did not always discount these bills, they would pay cash. Reversed in the House of Lords, and these facts allowed to be proved, if they should not be admitted by the respondents.

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On the 26th April, the appellant, John Stein, entered into a transaction with the respondent, Thomas Stewart, whereby the appellant agreed to deliver certain quantities of spirits to Mr. Stewart, at certain stated terms, as set forth in the following letters, on receiving bills from him at a certain date, guaranteed by the other respondents James Sommervail & Co.—“*Leith, 20th April 1792.* Mr. Thomas Stewart, Sir, In consequence of what has just now passed betwixt us, I hereby make you offer of 100 puncheons common aqua vitæ, deliverable at your cellars at Leith in the course of four weeks from this date, at 2s. 6d. per gallon, at the strength of one in ten under hydrometer proof, per Clerk’s instrument, of a quality such as the sample to be shown you, and sealed to-morrow; the amount to be payable by your acceptances at four months from the date of the deliveries, or when you find it more convenient, to pay cash, the common interest being allowed. I also make you a farther offer of 600 puncheons of the same quality, deliverable in quantities of 12 puncheons weekly, at 2s. 2d. per gallon, of the strength of one in ten hydrometer proof, per Clerk’s instrument, to be payable by your acceptance at three months from the date of each settlement, which shall take place at the end of every fortnight; it being understood that the delivery of the weekly quantity is to take place on the beginning of June next, and that the spirits are to be delivered of a strength under twenty per cent. over hydrometer proof. Upon these terms I hereby agree to deliver you these 700 puncheons of aqua vitæ, and your letter of acceptance shall render this conclusive. And I further promise, that before making any further sale to any other house upon as low terms, (the houses of William Forlong & Co.,

1796. “ and Adam and Mathie excepted), you shall have the re-
 ———— “ fusal of such a sale at any time during this contract. It
 STEIN “ is, however, provided, that if any alteration should take
 v. “ place in the duties to government, either by an additional
 STEWART, &C. “ duty on the stills, or otherwise, that then, if we cannot
 “ agree with regard to the difference, either party shall have
 “ it in their power to put an end to this agreement. As
 “ you are not particularly acquainted with the quality of
 “ the sample to be produced to-morrow, I engage that it
 “ shall be such as I in general sell. The empty casks are
 “ either to be returned in the course of six months, or if at an
 “ average they contain above 470 gallons, to be paid for at the
 “ rate of 12s. each, and if less, at the rate of 10s. each. It
 “ is also understood that Messrs. James Sommervail & Co.
 “ have a concern in this agreement, and are to guarantee its
 “ due performance in every respect. (Signed) JOHN STEIN.”

April 26, 1792. Mr. Stewart, of this date, gave in counter missive of accept-
 ance to these terms, and besides delivered to Mr. Stein the
 following guarantee from Messrs. James Sommervail & Co.,
 —“ 26th April 1792. We hereby engage that the above
 “ bargain which you have made with Mr. Thomas Stewart,
 “ shall be implemented in all respects on his part; and we
 “ become bound to see whatever acceptance he may grant
 “ on this account, paid in the same regular manner as if we
 “ were actually bound in them ourselves; and if at any
 “ time you choose to take our acceptances in preference to
 “ Mr. Stewart's, we have no objection to grant them.”

“ We are, (Signed) JAMES SOMMERVAIL & Co.”

It was alleged by the appellant, that though his letter
 was addressed to Mr. Stewart, yet that James Sommervail
 and Co. were the real parties dealt with, and Stewart merely
 their servant or rider. It was also alleged by him, that at
 the time these missives were entered into, the bills of
 Messrs. Sommervail and Co., accepted at the date stipulated,
 were currently negotiated, and could command money at the
 banks. And further, that it could not be supposed that,
 without a command of ready money, he (so recently com-
 menced business) could be able to manufacture twelve
 puncheons of spirits per week, and deliver them to the re-
 spondents. And accordingly, that it was on the faith of
 either receiving cash, or bills discountable at the bank, so
 as to produce cash as the spirits were delivered, that he
 could be able to perform his part of the transaction.

For eleven months ensuing, the appellant delivered

agreeably to his bargain, the quantities of spirits in question ; and received in payment thereof the acceptances of the respondents, which he got discounted with Mr. Alexander Allan, Banker in Edinburgh, whom Messrs. Sommervail & Co. had represented was a partner of their house, and would discount their bills.

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But in March 1793, Mr. Allan having declined to discount these bills any longer, and having also explained that he was not a partner in the house of James Sommervail & Co., the appellant resolved to put an end to the contract on his part, and accordingly refused to supply the respondents with any more spirits, whereupon the respondents raised the present action for implement; and the question was, Whether the stipulation of bills at short dates given in payment of the whisky, did not imply discountable bills, or bills that would produce at once money in the market; and whether the appellant was entitled to resile from the contract, on the respondents' bills becoming not discountable at the bank?

The appellant, on finding the bills not discountable at the bank, wrote the respondents, Messrs. Sommervail & Co., as follows:—"14th March 1793. It is not without a good deal of hesitation, and the earnest solicitation of many of my friends, that I take the liberty of addressing you on a subject so delicate as credit; I trust, however, that numerous and alarming failures, which are just now happening in every part of the country, and my inability to get your paper discounted, will plead my excuse. Previous to signing our contract, you will recollect, that I called you aside, and asked you who were your partners. I am very much mistaken if you did not then inform me, that Mr. Alexander Allan was among the number, and I have, of course, always represented him to be so when I applied for getting your paper discounted through any other channel. I have, however, been a good deal astonished within these few days, to be informed that Mr. Allan says he is not concerned with your house, and that I must have misunderstood your meaning. I, therefore, beg you will advise me how the matter stands; for if he is not concerned with you, it will be impossible for me to command cash upon your paper; but I trust that, considering the present alarming state of the country, you will have no objection, either to pay me ready money, as the spirits are delivered, or to find me such security as can command it. I have only to add, that I hope you will do me the justice, not to impute

1796. " this request to any improper motive ; for I assure you,
 STEIN " upon my honour, that though I must ultimately be a very
 v. " great loser by our bargain, I have not the most distant
 STEWART, &c. " wish or inclination to *allow* any improper obstacle to pre-
 " vent its being faithfully fulfilled. You have still a con-
 " siderable quantity to receive, and it shall be delivered to
 " you as soon as possible ; but I trust that you will agree
 " with me, that my friends, who, from the credit they grant
 " me, must be interested in all my transactions, have a
 " right to be satisfied with the security as well as myself."

In answer to this letter, Mr. Sommervail wrote the fol-
 Mar. 18, 1793. lowing :—" *Leith, 18th March 1793.* Sir, I have yours of
 " the 15th current, the first of the kind I ever received.
 " The situation of my company is not such that they can-
 " not bring money or security for the remainder of the con-
 " tract with you ; so that, on that score, you may keep your-
 " self easy. In supposing that I ever mentioned A. Allan
 " as one of my partners, you are mistaken ; the only persons
 " I am so connected with, are Mr. Thomas Gladstone and
 " Mr. A. Allan's nephew, Mr. Marr ; with these, under the
 " firm of James Sommervail and Co., I have been a partner
 " about four years, during which period they have main-
 " tained credit far beyond what they had occasion for. I
 " by no means blame you in being cautious ; were it generally
 " the case, such large failures would never have happened,
 " because they never would have got so extensive credits."

Relying on the representation this letter held out, that
 " money or security for the remainder of the contract,"
 would be forthcoming, the appellant, subsequent to these
 Mar. 23, 1793. letters, delivered an invoice of spirits to the amount of
 £1500. After which another transaction happened with re-
 spect to a parcel of these spirits, which, as it is material for
 illustrating the meaning of the parties, shall appear from
 the following words of the appellant's condescendence,
 which were offered to be established by proof, had the Court
 below allowed it. " Condescendence, article 12th, that owing to
 " the pursuers not being able about this time (March 1793),
 " to procure cash or discountable bills to the defender in
 " return for his spirits, no spirits were delivered to them for
 " some weeks. From this circumstance, the defendant had
 " upon hand spirits to the value of about £1500 sterling,
 " ready to be delivered ; that several letters, and a good
 " deal of conversation, took place between the parties with
 " regard to these spirits ; and that, in particular, Mr.

“ Stewart came to the defender’s counting-house at Cannon-
 “ mills, and told him, in the presence of his clerks, that he
 “ was in perfect safety to deliver over the spirits, because
 “ cash would be paid for what was at present to be taken
 “ away, and that Mr. Sommervail had spoken to Mr. Allan,
 “ who would now discount the bills for the remainder.
 “ 13th, That, in consequence of the assurance, the defender
 “ did deliver to the pursuers spirits to the value of £400, for
 “ which he received Somervail & Co.’s bill at four months
 “ date, which, in mercantile transactions, is equivalent to
 “ cash. The remainder of the spirits, (about £1100 worth),
 “ were laid aside in a cellar within the defender’s works;
 “ that he received for the spirits so laid aside, Sommervail
 “ & Co.’s bills, at two and three months, under a positive
 “ and explicit assurance that Mr. Allan would discount them
 “ when presented. 14th, The above mentioned transaction
 “ was not finished in the same way in which the other
 “ transactions betwixt the parties had been finished, be-
 “ fore the difficulty of discounting the bills occurred. In
 “ every transaction before that time, the defender handed
 “ to Mr. Stewart, or to Messrs. Sommervail & Co., a settled
 “ account, in which, after charging them with the spirits,
 “ he gave them credit for their acceptances, as so much
 “ value received from them. On this occasion, no such
 “ account was handed them, nor was any receipt given for
 “ the bills, as had always been done in former transactions,
 “ until it was known whether the bills would be discounted
 “ by Mr. Allan or not”

“ 15th, That when Mr. James Reid, the defender’s clerk,
 “ presented the bills to Mr. Allan, he refused to discount
 “ them, giving as his reason, that he was exceedingly dis-
 “ satisfied with the mode in which Sommervail & Co. were
 “ doing business, and that they had extended their transac-
 “ tions beyond the bounds of prudence, adding farther, (a
 “ circumstance to which the attention of your Lordships is
 “ particularly called), that he had not been able to procure
 “ payment of some of the bills of Sommervail & Co., which
 “ he had discounted to the defender, in any other way than
 “ by taking from Sommervail & Co. other bills in lieu of
 “ them.”

The appellant thereupon wrote the respondents, declin-
 ing their acceptances as a settlement for the spirits, on the
 ground that he could not get them discounted, and wish-
 ing to know if they were ready to comply with their offer,
 “ either to give cash, or find satisfactory security that would

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“ command it,” otherwise he would be under the disagreeable necessity of dissolving the contract.

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To this letter Messrs. Sommervail & Co. returned for answer,—“ Sir, As it is inconvenient for you to accept our bills
“ for the balance of last settlement of whisky, we shall, on
“ or before this day week, or Thursday following, get you
“ cash, or such security as will entitle you to it. If cash is
“ actually wanted, it will be given you; and if not given, to
“ dispose of the whisky on our account to best advantage for
“ money.”

Whereupon the appellant was under the necessity of answering as follows :—“ You owe me, by acceptances now
Apr. 15, 1793. “ current, £2237. 7s. 9d., and that when I agreed to lay
“ aside the last parcel (of spirits) for you, it was upon the
“ express condition of your either paying me money, upon
“ the usual discount, or finding me such security as would
“ command it. As, however, you have been unable either
“ to do the one or the other, and as I possibly cannot hold
“ the goods longer, I am sorry to be under the necessity
“ of informing you, that if the amount is not paid in money
“ before 11 o’clock to-morrow forenoon, I shall hold our con-
“ tract to be at an end, and will immediately dispose of the
“ spirits on my own account.”

In reply to this, the appellant received for answer :—“ 17th
Apr. 17, — “ April 1793. In answer to yours of yesterday, we have
“ consulted our man of business, and several others, upon
“ the propriety of your insisting on cash or security from
“ us, all of whom decidedly say, you have no right whatever.
“ We are determined not to take back the bills we gave you,
“ unless it suits our own conveniency. You must prove that
“ we are not in good credit ere you can insist on security.
“ Were you but commonly polite, in a few days we might
“ pay you cash, but your behaviour merits no favour. If law
“ is your recourse, we are prepared for you.—We are,” &c.

The action was brought before the sheriff, who, having found that the appellant was bound to implement his contract, an advocacy was brought, in which the Lord Ordinary found, 1st, “ That by the terms of the contract be-
Jan. 14, 1794. “ tween the said John Stein and Thomas Stewart, the
“ spirits furnished by the said John Stein were declared to
“ be payable by the acceptance of the said Thomas Stewart.
“ 2d. That by the letter of guarantee, granted by the pur-
“ suers, Messrs. Sommervail & Co. they became bound that
“ the said contract should be duly implemented in all re-
“ spects by the said Thomas Stewart, and to see whatever

“acceptances he may grant on this account paid in the 1796.
 “same regular manner as if we were actually bound in
 “them ourselves. 3d. That such being the terms of the STEIN
 “contract, the defender was not entitled to insist that the v.
 “pursuers should enable him to discount the said accept- STEWART, &c.
 “ances, or to raise cash on them, before the term of pay-
 “ment. Therefore, finds, 4th, That the contract must be
 “held to have been a subsisting contract down till the
 “period when the additional duty on spirits imposed in last
 “session of Parliament took place; and, before further
 “answer, appoints the pursuers, within ten days, to give
 “in a precise state of their claims against the defender upon
 “the footing of this interlocutor.” On representation, the
 Lord Ordinary adhered: And, on reclaiming petition to the Jan. 31, 1794.
 Court, they adhered (21st Feb. 1794). And, on second pe-
 tition, they ordered the appellant to give, before answer, a
 condescendence, “stating the special facts he offers to prove May 14, —
 “in support of the pleas maintained by him, and the mode
 “of proof proposed for establishing the same.”

A condescendence was accordingly given in; and besides
 the articles above quoted, the appellant also offered, in this
 condescendence, to prove the understanding and custom of
 merchants as authorizing a dealer to withhold delivery of
 the goods agreed to be sold on credit, if the credit of the
 purchaser is suspected, or the bills cease to be marketable.

The Court, of this date, only allowed a proof of this conde- June 12, —
 scendence, in so far as it alleged that it was stated by the
 Messrs. Sommervail & Co. that Mr. Allan was a partner
 in that concern. The contract of copartnery was produced.
 The appellant then craved to be allowed to prove their whole
 statements in their condescendence, but their Lordships re-
 fused the desire of the petition, and adhered to their former Nov. 27, —
 interlocutor; thereafter the appellant put in another peti-
 tion, the Court renewed the term for proving, and *quoad* Dec. 11, —
ultra, adhered. They afterwards “circumduced the term
 “against the defender, for proving, in terms of the inter- May 27, 1795.
 “locutors of 12th June and 11th December.” And, of this
 date:—“The Lords having resumed consideration of the May 28, —
 “cause, with the whole former proceedings held therein,
 “they of new adhere to their interlocutor of date 21st Fe-
 “bruary 1794, adhering to the Lord Ordinary’s interlocutor
 “of date 31st January 1794, and remit to his Lordship to
 “proceed accordingly, and do further as he shall see just.”

Against these interlocutors the present appeal was brought
 to the House of Lords.

1796. *Pleaded for the Appellant.*—The bills of merchants of good credit are a marketable commodity. A banker has a certain profit in buying them with ready money; and the privileges conferred upon them by law, which render them transferable to the purchaser, free of all embargo, renders this traffic in the purchase of bills among the least hazardous of commercial dealings. When, therefore, the appellant stipulated for bills *at short* dates from the respondents for his goods, instead of leaving the price standing upon an open account, he must be understood to have stipulated for a security convertible into cash upon carrying them to the proper market. But it is allowed, that when the appellant withheld his goods, and demanded cash, or additional credit, to render the bills of the respondents marketable, no cash could be obtained for the bills, upon the security of the respondents, from any banker in Edinburgh. There was here, therefore, a failure of performance of a mutual contract, according to the true meaning and intent thereof, on the part of the respondents, and, according to the general rules of law, the appellant was entitled to refuse implement on his part.

It is evident from the tenor of the correspondence between the parties, from the 14th March to the 17th April 1793, when the respondents had recourse to the opinion of a solicitor or attorney, that they, as well as the appellant, understood perfectly that the appellant was justly entitled to have, in return for his goods, cash, or bills saleable at market; and it cannot be questioned but that the respondents, had they felt a doubt on this point, would have availed themselves of it in their letters to the appellant, as these letters both prove that they were offended at the implied suspicions against their credit, and were under considerable difficulty how to manage the negotiation successfully. This conduct, therefore, upon the part of the respondents, demonstrates either that they understood the true meaning of their contract with the appellant to import an obligation on their part, to find him marketable bills, or that it was their belief, as merchants, that, according to the custom of trade, the appellant was entitled to the demand he made. In either case, it is plain this affords a strong ground to justify the proposition maintained by the appellant, that, by the meaning of the contract, and by the custom of merchants, he was entitled to marketable bills for his goods, and when such bills were no longer delivered, he was of course free from the contract.

Even independent of the express stipulation for bills of short or discountable dates, it is a rule of practice among merchants, and a rule which the Court below seemed to recognize, at least in the opinion of the judges, that no dealer is bound to fulfil an agreement to deliver goods to another dealer on credit, if circumstances occur that are sufficient to justify a suspicion of the credit of the merchant purchaser at the time. Now, it is thought, there could not be a better criterion of a merchant's credit being impaired than that the bankers, who are constantly in use to discount his bills, and in the knowledge of his dealings, refuse to discount them any longer, and that not because their own situation might render it inconvenient for them to discount bills at all, but because the purchaser had acted discredibly in not retiring with cash certain of his bills which they had recently discounted, but had sought for a delay of payment, and renewal of the bills; and if the banker who thus refused to discount the bills was, or had recently been connected with the purchaser in business, it is conceived the seller was justified in entertaining the most serious alarm as to the credit of the purchaser, and in withholding his goods, unless his fears were removed by additional security. The appellant has invariably offered to prove, by the most unexceptionable witnesses, that previous to his applying to the respondents for further security, Mr. Allan, whose interests with the respondents' house has been pointed out, refused to discount their bills, on account of their not having retired their bills formerly discounted, otherwise than by renewal; and that no other banking house in Edinburgh would discount them at that period, without additional security. It is contended, therefore, that the appellant was entitled to withhold his goods, for which he could command cash otherwise.

Taking, therefore, the whole circumstances into consideration—the fact, that it was believed among mercantile people, that Mr. Allan was a partner in the respondents' concern: Also, that the appellant was distinctly made to understand this from Sommervail & Co. themselves when asked the question, (both of which facts the Court below erroneously refused a proof, although material and relevant to the question at issue). Also, taking into consideration the fact now proved by their contract of copartnery, that, in point of fact, Mr. Allan was a partner of that house down to the month of October 1791, when he transferred his in-

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terest to his nephew, it is demonstrable that the appellant must have entered into the bargain under the sole belief that Mr. Allan was a partner. And whether this belief was right or wrong, it is clear that the proof offered that Messrs. Sommervail had held him out as still a partner, ought to have been allowed; because it was on the faith of this fact that he entered into the bargain. Still, from the evidence of the facts already in process, the appellant hopes that there are sufficient grounds for reversing the judgment appealed from.

Pleaded for the Respondents.—The appellant had no right, during the currency of the agreement between him and the respondents, to alter the nature of that agreement, by demanding cash or security, when bills only were stipulated. He has not stated any relevant facts or circumstances sufficient to make his case an exception to the general rule of law, or at least of the only facts which had any colour of relevancy. The appellant stipulated only for bills, not for bills that should always be discountable. Bills are discountable or not just as the bankers chance to find it convenient to buy bills; and at this time bankers found it necessary to contract their dealings; but it would be an extreme hardship to allow, on this account, the appellant to change the nature of the bargain from payments by their bills, to payments in cash, or additional security.

After hearing counsel, it was

Ordered and adjudged that the several interlocutors of the Lords of Session of the 21st of February, 27th November, and 11th December 1794, and 15th, 27th, and 28th of May 1795, be, and the same are hereby reversed: And it is farther ordered that the cause be remitted back to the Court of Session to allow a proof to the appellant in terms of the interlocutor of the 12th June 1794; and also of the facts stated in the condescendence given into the Court by the appellant, referred to in the interlocutor of the 27th November 1794, as hereby altered and restricted, if the same shall not be admitted by the respondents; viz. of that part of article first, which states that Mr. Allan had made large advances to James Sommervail & Co., for which he took more than five per centum of interest or profit; of that part of article 3, which states that Mr. Sommervail, previous to the contract in April 1792, told Mr. Mal-

colm Brown, the defender's rider, that Mr. Allan was his partner; and that Mr. Allan had sent his nephew, Mr. Marr, to the house of Sommervail & Co. with a view to succeed him; that Mr. Sommervail was extremely jealous of this, and meant to keep Mr. Marr in the dark as to his business, lest Mr. Marr's knowledge, and Mr. Allan's money, might give them too great an ascendancy in the house; of the whole of article 8;—of article 9, in as far as it states, that Mr. Sommervail assured the appellant that he might always depend upon Mr. Allan discounting the bills of his company, or otherways they would pay cash; that the appellant proposed to insert a clause in the missive to this effect, and Mr. Sommervail assured him that such a clause was totally unnecessary; of the whole of articles 10 and 11;—of that part of article 12, which states that the appellant had upon hand spirits to the value of above £1500, ready to be delivered; that several letters, and a good deal of conversation took place between the parties with regard to these spirits; and that, in particular, Mr. Stewart came to the appellant's counting-house at Cannonmills, and told him in the presence of his clerks, that he was in perfect safety to deliver the spirits, because cash would be paid for what was then to be taken away, and that Mr. Sommervail had spoken to Mr. Allan, who would now discount the bills for the remainder; and of the whole of articles 13, 14, 15, 16, 17, 18, 19, 21, 22, and 26: And it is also ordered, that the Court do also allow a conjunct proof to the respondents of all relevant facts and circumstances: And it is further ordered, that on such proofs being taken, the Court of Session do review the interlocutors of the Lord Ordinary of the 14th and 31st January 1794, and pronounce such decree as shall be just, upon the whole matter in question: And it is also further ordered, that the said Court do give all necessary and proper directions for carrying this judgment into execution.

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EX-STEWART, &c.

For Appellant, *Sir John Scott, W. Adam.*

For Respondents, *W. Grant, Matthew Ross, C. Hope.*

NOTE.—Professor Bell notices the decision in the Court of Session, (Principles, § 105; and Illustrations, p. 106), without observing that the case was reversed in the House of Lords.

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M'LEAN, &c.
v.
CAMERON.

HELEN M'LEAN, formerly Helen Cameron,
Daughter of the deceased John Cam-
eron of Collart, now wife of Lieutenant
Colin M'Lean of the 79th Regiment, and
the said Colin M'Lean, for his interest,

} *Appellants ;*

EWAN CAMERON of Fassifern, . . . *Respondent.*

House of Lords, 27th April 1796.

LEASE—SINGULAR SUCCESSOR—ACT 1449.—Held, that a lease not completed in point of form, and on which no possession followed, was not good against a purchaser of the estate.

1745. The appellant's grandfather, Allan Cameron, having joined in the rebellion of 1745, his estates were forfeited to the crown.

The policy of the government was to make these forfeitures fall as lightly as possible upon the descendants of the forfeited person, who had had no part or participation in the rebellion; and, accordingly, several acts were passed, permitting their children to redeem the estates under certain conditions.

1776. In 1776, the Commissioners for the annexed estates, granted a lease of the Mains of Collart, for forty-one years, to John Cameron, the oldest son of the forfeited person, and his spouse, "for her liferent use allenary, during all " the days of her lifetime, after his decease."

The said John Cameron had then only two daughters, Janet, and Helen the appellant.

March 3, and
July 1, 1777.

Of these dates, the Commissioners granted a lease to the widow of the forfeited person, and the mother of the above John Cameron, of the lands of Lecht and Branahan, being parts of the forfeited estate of Collart, for a rent of £9. 3s. 10d. She afterwards assigned this lease to her son.

The said Helen Stewart, widow of the forfeited person, applied to the Government Commissioners for a new lease, stating that it would be for the interest of the family that a new lease be granted, in lieu of the former to herself, and failing of her, to Helen Cameron (the appellant) and her heirs. The petition prayed for a new lease, accordingly, "on her renouncing her said liferent lease." In answer to this petition, the Government Board, by their minute, declared that, "The Board proposed to grant the lease prayed " for, on the usual conditions."

June 1781.

No formal lease, however, was executed.

Afterwards, and by the act 24 Geo. III. c. 57, (1784) John Cameron, as heir of his attainted father, acquired the property of the estate of Collart, burdened, of course, with the debt thereon, and the leases granted by the Board.

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———
M'LEAN, &c.
v.
CAMERON.

In 1787 John Cameron made a will, whereby he left to his daughters £1000 each; the sum of £1000 to his daughter Helen, being bequeathed to her in lieu of the right she has to the tack of Lecht. Soon thereafter, and in December 1787, on the marriage of the appellant, he executed a bond for £1000 in her favour. The sum under this bond was paid by John Cameron; but the discharge did not make the smallest allusion to the lease to which she had right, and in lieu of which the £1000 was paid. In December 1787, he sold the estate to the respondent for £7600.

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John Cameron executed various deeds thereafter, the last of which conveyed the estate to his brothers german Jan. 8, 1789. for certain purposes, and to pay additional sums to his two daughters, "declaring that these provisions are granted to them respectively, in lieu of such tacks, and no otherwise." Mr. Cameron died in the year following, and soon thereafter the appellant gave intimation, before paying the purchase money, that she meant to claim her rights, under the lease granted to her by the government commissioners. Upon which the respondent brought the present action of declarator and multiplepoinding, as to the price. Helen Stewart had renounced her liferent interest in the lease.

After various procedure, the Lord Ordinary pronounced a special interlocutor, adhering to his former interlocutor, in favour of the appellants.

But, on petition to the whole Lords, the Court pro-Feb. 1, 1793. nounced this interlocutor, "They alter the interlocutor re-claimed against; find that the appellants have no right to the tack in question, in competition with the petitioner (respondent), a singular successor. Remit to Lord Craig, in place of Lord Hailes, to proceed accordingly, and to do as he shall see just."

Thereafter the Lord Ordinary assoilzied the respondent, June 1, 1793. in terms of the above interlocutor of the Court.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—1. It is manifest that the petition addressed to the Commissioners of the forfeited estates in 1781, was presented not only in the name, but with the privity and concurrence of Mrs. Helen Stewart, and

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that any denial of that fact by her subsequent to the commencement of the cause, ought not to have been received in evidence. Besides, the condescendence proves that Mrs. Stewart had, *de facto*, passed from the prior lease for her life, and was in possession under the new grant, 1781, and that she so considered herself. Thus, having an interest clothed with possession, it is difficult to conceive how the statute 1449, is brought to bear at all upon the present case; the only purpose of that statute being to protect persons who held leases for terms of years, in the enjoyment of those terms, notwithstanding any subsequent disposition of the land by the proprietor. 2d. The leases so granted by the Commissioners in June 1781, can never be said to have merged in the subsequent restoration of the property of the estate, to the heir of the forfeited person, the legislature having, by an express clause, declared, that the general provisions of that act should not affect their validity, whether they amounted to regular complete leases by formal deeds, or whether they stand only upon minutes and resolutions of the board. 3d. That resolution of the Board conveys to the appellant a complete title to the possession of the lands of Lecht, &c., after her grandmother's death; a title which was as independent of John Cameron, her father, as if it had been granted out of any other forfeited estate, and therefore, as she never renounced her interest in the lease, she is entitled to the benefit of the same, against a singular successor.

Pleaded for the Respondent.—1. The appellants' pretensions are founded upon an obvious misconstruction of the words of the statute 1784. It declares and enacts nothing more, than that the validity of feus and leases, which have been entered into in the manner stated in the recital, (that is, which have not been formally completed, but stand upon minutes and resolutions of the Board, though possession shall have followed), shall not be affected by anything in the act. The intention was to support agreements complete in substance, though not in form; but it is as much against the words as the spirit of the act, to represent as bestowing on a transaction like this, merely inchoated, but not completed or acted upon, the efficacy of a formal and concluded agreement. The petition to the Commissioners prayed for a new lease to Mrs. Cameron, *on her renouncing the one she then held, and upon the conditions therein specified*, on which, the Commissioners *proposed* to grant

the new lease, on the usual conditions. To call this an agreement *bona fide*, binding on the parties, is perfectly absurd. There can be no binding agreement where the parties are at variance,—the condition of renouncing the former lease was never fulfilled. The minute was not obligatory on the Commissioners, nor was there ever any obligation on Mrs. Stewart to renounce the former lease. 2d. But after the absolute restoration of the property of the estate to the same family, the minute was not obligatory, even in equity. What the Commissioners proposed to do, was an act of favour towards the forfeited person's family, and the object of the Commissioners in granting the leases, was to promote improvement, and to prevent the estates from getting out of cultivation. 3d. But even if a formal lease had been made out, and executed by the Commissioners, the appellant's right therein was merely in the character of a provision provided for a portionless daughter. She could not have claimed the possession in a question with her father or his trustees, and least of all in a question with the purchaser of the lands. Moreover, the petition for the new lease prayed for a lease to Mrs. Cameron *herself*, "whom failing, to her granddaughter" only. But, as Mrs. Helen Stewart or Cameron was alive until after the purchase, the appellants' right did not emerge until after the respondent had acquired right. 4. Even if these proceedings were otherwise regular, they could not affect the right of a *bona fide* purchaser. Leases are merely personal rights, and are only made real and available against purchasers, or singular successors, by the statute 1449; but it is laid down by every lawyer that they cannot have this effect without their being clothed with actual possession. Here no such possession ever followed, and old Mrs. Cameron's possession could only be imputed to her former lease, which was never renounced.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *W. Grant, Jas. Allen Park.*

For Respondent, *R. Dundas, Wm. Tait.*

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Lieutenant JAS. FYFE, in Edinglassie, and
 ARCHIBALD YOUNG, Procurator Fiscal of } *Appellants*;
 Banff,

MARGARET WILLIAMSON, Wife of James Gor-
 don, in Haugh of Edinglassie, and the } *Respondents*.
 said JAMES GORDON, for his interest,

House of Lords, 10th March 1796.

**REDUCTION OF WILL—FRAUD AND CIRCUMVENTION—DAMAGES FOR
 WRONGOUS IMPRISONMENT.**—A party had made two several
 wills, leaving to his relations his whole fortune, upwards of £3000.
 Six days *before* his death, and while *in extremis*, Lieutenant Fyfe,
 a mere stranger to him in blood, employed a notary to come to
 Fyfe's house, to write out a will in his favour. They then went
 to the house of the deceased, and got it executed. Mr. Fyfe pro-
 curing the former will, and burning it without any instructions
 from the deceased. Held, the will reducible, and reduced accor-
 dingly. The sister of the deceased, along with her husband, having
 resisted Fyfe's attempt to get delivery of the papers and reposi-
 tories, in consequence of which a warrant of the Sheriff was ob-
 tained, and an officer with a party of soldiers appeared, and
 dragged off her husband to prison. Held, the imprisonment
 illegal, and damages awarded in consequence.

This was a reduction of a will, raised at the instance of
 the respondent, Margaret Williamson and husband, against
 the appellant, on the following grounds:—1. “ That the
 “ will of her deceased brother, Alexander Williamson, con-
 “ tained a destination of leases belonging to him, which
 “ being heritable subjects, could not be disposed of by a
 “ testament. 2. That the foresaid will was improperly
 “ elicited, and impetrated by the appellant, James Fyfe,
 “ through gross fraud and circumvention on his part, and
 “ at a time when the granter, the said Alexander William-
 “ son, was incapable of attending to his own affairs.” 3.
 “ That Mr. Fyfe took away a prior will, which settled Mr.
 “ Williamson's fortune among his relations and friends ; and,
 “ under pretence of getting it subscribed on stamped paper,
 “ Mr. Fyfe did fraudulently cause it to be made out at his
 “ own house, totally different, and devised for his, the de-
 “ fender's own ends, nominating him sole executor and
 “ manager of the deceased's affairs.”

After the death of Alexander Williamson, the appellant having applied to the Sheriff for warrant to lock up and seal the deceased's papers and repositories; this was resisted by the respondents, whereupon he applied again to the Sheriff, with concurrence of the Procurator Fiscal, to search for, and take possession of the papers and writings mentioned in an inventory produced, whereupon the Sheriff granted warrant to officers of the Court to search the house and repositories of the said *James Gordon* and *Margaret Williamson*, for the writings mentioned, and granted warrant to apprehend both these parties, to appear before him for examination under this warrant. An officer, with a party of soldiers, apprehended Gordon, and imprisoned him. Under the Sheriff's interlocutor, they were also assessed in £15 damages, and in a fine of £50. Gordon was only enlarged from prison on a bill of suspension, wherein the Lord Ordinary found the procedure irregular, and the fine imposed exorbitant.

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In consequence of these proceedings, a summons of reduction was also raised, containing separate conclusions for damages, on account of this illegal procedure and imprisonment, and also a conclusion for reducing the decret and warrant of the Sheriff of Banffshire.

The appellant was a total stranger to the deceased in blood. The respondent was the deceased's sister, in favour of whom and her mother, a former will had been executed.

A proof being ordered and led, it was proved as to the execution of the will, that the appellant Fyfe had sent for the notary who drew out the will, to his own house, where he dined, and where he got particular instructions from Fyfe. He was ordered to bring stamp paper with him, which he did accordingly; and he was informed that Mr. Williamson wished a settlement made, and that he (Fyfe) was to be his executor. That after dining together, he proceeded to Mr. Williamson's house, where he found Mr. Williamson lying in bed. That the former settlement made by Mr. Williamson was produced, which he read over, after which, he began a scroll of a new settlement. "Every clause, as the deponent wrote it, was read over by Mr. Fyfe, who made observations and alterations as I went on." That after this was done, he transcribed it on stamp, and this he did at Mr. Fyfe's house, partly that night, and partly next day. That Mr. Fyfe and he returned next day to Mr. Williamson's house, and found Mr. Williamson in bed. That he read over

1796. the will to him. That there were no persons then present, except Mr. Fyfe. That after it was read, James Malcolm came in to witness it. That Mr. Williamson called for some person to assist him to get up and sit in bed to sign the will. James Malcolm did so. Whereupon Williamson signed the will, in presence of the deponent and James Malcolm as witnesses. "That, to the best of his recollection, he is certain "there was one marginal note on the will, and no more. And "being desired to look at the will, and asked how many marginal notes appear upon it now?" "Depones, he observes two "upon the second page, and the undermost of the two is the "one he recollects, and which is in his hand-writing. Depones, "that after the new will was executed, the former one was "burned in his presence by Mr. Fyfe. He did not hear Mr. Williamson instruct Mr. Fyfe to burn it. That the uppermost of the two marginal notes is in the deponent's hand-writing, and which he wrote at Mr. Fyfe's house, before he went to Mr. Williamson's house. That at the time the will was executed, Mr. Williamson appeared to be of sound judgment, and perfectly collected." Malcolm, the other instrumentary witness, swore he was sent for by Mr. Fyfe. That he knew not what was in the deed, and it was not read over to Mr. Williamson in his presence. He was so weak in body as to be unable to rise out of bed.

In regard to the illegal procedure of Mr. Fyfe after the deceased's death, the Lords pronounced this interlocutor:—
 Nov. 13, 1793. "Reduce the decree or warrant of the Sheriff of Banffshire, "libelled on, in so far as to assoilzie the pursuers (respondents), from the damages and expenses, and also from the "fine thereby found due; and reduce, decern, and declare "accordingly. Find the defenders, Lieutenant Fyfe and "Archibald Young, Procurator Fiscal for the county of "Banff, conjunctly and severally liable to the pursuers in "the expenses incurred by them before this Court, but not "to those expenses incurred in the Sheriff Court; in consequence of the pursuers' improper conduct. Find the said "defenders, Lieutenant Fyfe and Archibald Young, also "liable to the pursuers in damages, and ordain a condemnation of these to be given in."

With regard to the reduction of the will, the Court pronounced this interlocutor:—
 Nov. 30, ——— "Sustain the reasons of reduction of the latter will and settlement, executed by the "deceased Alexander Williamson libelled on, and reduce, "decern, and declare accordingly. Find the defender liable

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“ to the pursuers (respondents) in expenses, and allow an
“ account thereof to be given into Court.”

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On petition the Lords adhered.

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Their Lordships thereafter modified the expenses to
£130, and decerned against Lieutenant Fyfe for the same.

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Jan. 18, 1794.

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They afterwards pronounced this interlocutor:—“ The
“ Lords having advised the condescendence of damages, in the
“ process for wrongous imprisonment and damages against
“ Lieutenant Fyfe and Archibald Young, with the abstract
“ liquidating the amount of the said damages, together with
“ the account of expenses, they modify the whole damages,
“ in so far as respects the wrongous imprisonment,
“ to the sum of £50 sterling, including those expenses
“ charged in the said abstract, as composing part of the
“ pursuers’ damages, and modify the damages respect-
“ ing the lease to £10 sterling; and also modify the ex-
“ pense of process to £80 sterling, in full, including agent’s
“ fee, and the account of expenses stated for the pursuer’s
“ agent in the country, and decern against James Fyfe and
“ Archibald Young, conjunctly and severally, for payment
“ of the said sums of £50 and £80, amounting to £130,
“ and against the said James Fyfe, for the other sum of £10.”

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant Fyfe.—1. The interlocutors
appealed from have set aside a will regularly executed by
the testator, and disposing of property which he had a right
to dispose of as he thought proper, on grounds which, so far
as they can be collected from the proofs and proceedings,
do not amount to a cause of suspicion. There never cer-
tainly was a case in which the plaintiffs’ allegations were
more inconsistent, and more completely defeated by the
evidence adduced. According to the respondents’ allega-
tion, the testator’s incapacity was of such a nature, that the
whole neighbourhood must have known of it; but the whole
evidence adduced on this occasion is mere *hearsay*, and no
positive evidence is adduced.

On the other hand, the deposition of Stewart the notary,
as to the testator’s capacity, is direct and positive. He was
the party employed to execute the will, and consequently the
party most likely to take notice of this, and he swears that
he was of sound judgment, and quite collected when he
signed the will. On what grounds, therefore, the imputa-
tion of fraud can be supported, is nowhere apparent. 2.
In regard to the damages of wrongous imprisonment,—as
the respondents, by their improper conduct, brought upon

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them the consequences complained of, these interlocutors ought to be altered.

Pleaded for the Respondents.—The deceased had made two prior wills, in favour of his relations, one in Jamaica, and another when he came home, and in the month of April, previous to his death, leaving to them his whole fortune among them; the last of which existed up to within six days of his death, when the appellant, a mere stranger, got the deceased to execute in his favour a new will, and burned the former. The new settlement was made at the suggestion, and by the intervention alone of the appellant. He sent for the writer, got him to his own house, where they were together for sometime, and where the appellant tutored the writer what he was to do, and thereafter carried him to the deceased's house. The deceased was then *in extremis*,—so weak in body as to be unable to rise out of bed,—was much impaired in his mental faculties, and was often delirious from disease, and from quantities of laudanum which he was under the necessity of taking. He had never any quarrel or any cause of displeasure against his own heirs at law. But the manner in which it was executed, shows that it was fabricated. There were certain marginal notes and additions made to the will, after it was signed, which prove this. In the bequest to John Williamson, the testator's natural son, of £300 sterling, there was added upon the margin the words, “ of which sum he has received £180 sterling, before this “ date.” These words are put upon the margin, and it does not appear from the deed by whom they were written. At the bottom of the second page of the will, there are two lines added after the word “ appoint,” which has originally been the catch-word to the third page, but now there follow on the bottom of the second page, the following words: —“ My said executor to pay the above sum from the money “ lodged in Mr. Davidson's hands in Huntly.” The reading then breaks off in the middle of a line, leaving the remainder of the line blank, and without any catch-word; and, in order to carry on the sense of the original catch-word “ appoints,” is altered to “ and appoints.” Both by the evidence of Stewart, and the admissions of the appellant himself, it is clear that these additions and alterations were made after the will was executed.

2d. In regard to the proceedings before the Sheriff, these were most illegal and oppressive. The appellant, when he demanded the papers alluded to, to be delivered to him, was insisting for what he had no right to demand. He was

not confirmed executor; besides, the Commissary's warrant did not bear that the papers were to be delivered to the appellant. It only directed an inventory to be taken of them. It was therefore wrong in the appellant to present a new petition, charging the respondents with theft, as they did. They appeared before, and declared their readiness to an inventory being taken. But the appellant, choosing to have delivery, it was illegal and oppressive thereafter to obtain a warrant to apprehend and imprison them, by aid of a party of soldiers, and to be treated in the brutal and inhuman manner that was here done. For all which the appellants are answerable in damages.

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After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Wm. Grant, Tho. Macdonald.*

For Respondents, *Sir J. Scott, W. Adam, W. Tait.*

SIR ROBERT ANSTRUTHER of Balkaskie, Bart. *Appellant;*
SIR JOHN ANSTRUTHER of Anstruther, Bart. *Respondent.*

House of Lords, 18th May 1796.

SUPERIOR AND VASSAL—RIGHT TO THE COAL—PERTINENT—PRESCRIPTIVE POSSESSION.—The respondent was proprietor of the barony of Pittenweem, which included the burgh of Pittenweem, and certain lands called Acredale lands, which had been feued out in small rigs or stripes long before he acquired right to the barony. This right included an express conveyance of the whole coal within the barony. He was also *superior* of the *whole*. Part of those lands, called the Acredale lands, belonged to the appellant. In these Acredale feus, the coal was either excepted, or the right was silent altogether on the subject. Among those, the appellant's right was silent. There was no conveyance of coal to him, and no reservation of it; but he contended that the conveyance of land carries the coal as a pertinent, and that the coal was mentioned as a pertinent in the tenendas of his right. When, therefore, the respondent proceeded to work the Acredale lands for coal, the appellant suspended, and the present declarator was then brought: Held by the Court of Session, and affirmed by the House of Lords, that the respondent had the sole right to the whole coal in the Acredale lands.

The respondent, proprietor of the estate of Newark, in

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the county of Fife, in which he worked a valuable seam of coal, purchased in 1766 from the Earl of Kelly, the lordship and barony of Pittenweem, chiefly induced to the purchase from observing that the continuations of the seam ran in the direction of those lands. The disposition conveyed the barony, with "the coals, coal-heughs, as well wrought as unwrought, discovered and to be discovered, in any part of the said lordship and barony, as well in the arable and ploughed lands, as in the other lands of the same, with special power of breaking and digging the ground, in any part of the said lands and barony, and of working the coal, and throwing out sinks and levels," &c. Upon his having been infeft, he became proprietor of all the lands of the barony not previously feued or disposed, and superior of all such as had been previously feued and disposed.

The barony, which includes the burgh of Pittenweem, had originally belonged to the Priory of Pittenweem; and, in anticipation of the abolition of the religious houses, the monastery had, before the Reformation, feued out their lands. Round the town, where the priory was situated, small feus had been granted to the town's people, generally in rigs or small stripes. These feus were called the Acredale lands, and, in granting them, the monastery either excepted the coal expressly, or the conveyance was silent on the subject altogether. Part of these Acredale lands were afterwards purchased by the appellant, but the greater part by the respondent; and the respondent, by his purchase of the barony of Pittenweem, in which these Acredale lands are situated, became superior of the whole.

After his purchase of the barony of Pittenweem from the Earl of Kelly, he proceeded to work the coal in these lands. He sunk various pits in the properties of the different feuers, without meeting with opposition from any quarter, until having laid a pipe crossing, amongst other rigs of the Acredale lands, those belonging to the appellant, the latter brought a suspension, which compelled the respondent to bring the present declarator of his right to the coal of all these lands.

The general defence of the appellant was, that not only his lands, but all these lands were conveyed, as is shown by the title-deeds, without any reservation of the coal. On the contrary, that though the coal was not expressly conveyed, yet it was mentioned as a pertinent in the clause of

ance of land carries right to the coal, though it is not expressly conveyed, insomuch that he who is first seized in the land, has a right to the coal in these lands, preferably to one who is afterwards seized *per expressum* in the coal. In answer, the respondent stated, that it was proved by his title-deeds that the priors and monastery of Pittenweem reserved the coal when granting feus of the Acredale lands: That the coal had been by them granted to Balfour of Pittendreich as a separate tenement: That Frederick Stewart, created Lord Pittenweem, acquired from the crown all that remained of the possessions of the monastery at the time of the general annexation of the church lands: That he likewise acquired, by a separate title, the right which the Balfours had to the coal; and that the Earl of Kelly acquired the whole that Lord Pittenweem had, and it remained with his descendents till they sold it to the respondent. That when the priory granted the feus of the Acredale lands, in such small stripes or rigs, it could not be intended, from the very nature and smallness of the grant, to give them a right to the coal. These rigs run from south to north, and so narrow as to make it impossible for the proprietor of each to work the coal; whereas the seams of the coal ran east and west. But, as a further proof that no right to the coal was so granted, the priors, although they had feued out to various persons the lands in and about the monastery, as well as those in question, yet continued to possess and dispose of the coal, notwithstanding the feus, as is shown by the several charters granted by them subsequent to the feus of the Acredale lands, with right to coal out of their coal mines, or out of any part of the lordship, for the use of the salt pans. Proof was led of possession of the whole coal of the barony subsequent to the grant of the feus of the Acredale lands, first by the priors, and then by their successors. The witnesses deponed that it had been wrought, especially at a place called the Horse Milne Sink and other places, in Oliver Cromwell's time, of which the coal holes were still visible; and that they had never heard of the coal in the barony being wrought by any but the Earl of Kelly's family.

The appellant produced a charter, under the great seal, passed in the year 1698, in favour of his grandfather, of all the estates which belonged to him, and amongst others, the small detached parcels of land in the Acredale of Pittenweem in question, which, the charter shows, had been originally separate feus from the barony, and describes it as lying within the lordship. In the dispositive and descriptive part of this

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ANSTRUTHER. charter, in so far as relates to these parcels, there was not a word of coal or limestone mentioned, although his *other* lands are granted "*cum carbonibus et carbonariis.*" In the tenendas clause, indeed, *the whole* lands are declared to be held "*cum partibus pendiculis pertinentiis, columbis, columbariis, carbonibus, carbonariis,*" &c., but it is known to every lawyer, that in *this part* of the charter, these are words of mere style and superfluity, vesting nothing but what appears in the dispositive clause. Yet, he maintained this to be a sufficient title to the coal of the lands in question, and declined, although called on, to produce the original charters, or grants of the parcel of lands he possessed in the Acredale.

Feb. 18, 1792. "The Lords having advised the mutual informations, writs, and proof produced, and heard parties' procurators thereon, they find the pursuer, Sir John Anstruther (respondent), has the sole right to the whole coal and limestone in the Acredale lands, within the lordship and barony of Pittenweem; and, therefore, in the suspension, find the letters orderly proceeded, and in the declarator, de-

Mar. 9, — "cern." On reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—As the right to coal and lime passes with the lands, unless specially reserved in the conveyance of the lands, and as there is no such reservation in the title deeds of the appellant, he has a clear right to all below the surface of his land. And a party so infeft, without any mention of coal, has a preferable right to the coal, to one who is afterwards seised in the coal, *per expressum*; and the appellant having been infeft under his unreserved and unlimited title long prior to the respondent, has consequently a title to exclude him therefrom.

Pleaded for the Respondent.—The appellant has not produced the vestige of a title to the coal in question. He does not pretend he ever worked any coal, or that his ancestors did so. The maxim he founds on, that coal passes by a grant of land generally as a pertinent, and that possession of the surface is possession what is below it, are incontrovertibly true, provided there is no right to coal vested in another, and no actual adverse possession by that other. But to set up a grant of lands simply with possession of the surface, but not of the coal, against a grant of the same lands with the coal joined to possession, was quite untenable. The respondent has an express grant of the whole coal of the barony. The charters to Lord Pittenweem in 1609, and

of the Earl of Kelly in 1671, give this express right, which, joined to possession distinctly proved, make a title in the respondent by the positive prescription. While the appellant, if he ever had a right, has lost it by the negative prescription.

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After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Sir J. Scott, R. Dundas, Alex. Anstruther.*

For Respondent, *J. Anstruther, W. Adam.*

EARL OF WEMYSS,	.	.	.	.	<i>Appellant;</i>
SIR ARCHIBALD HOPE,	.	.	.	.	<i>Respondent.</i>

House of Lords, 24th Oct. 1796.

LEASE of COAL—RESERVATION CLAUSE—RES JUDICATA.—Held, by the terms of a lease of coal to a tenant, allowing him to work the coal within the barony of Woolmet, excepting that part of the coal which lies within the parks, gardens, and enclosures of Woolmet belonging to the appellant, that this exception or reservation did not entitle the appellant to sink pits and work coal within these grounds; but was to be construed only as a clause to preserve his grounds from suffering injury by the general working of the coal by the respondent. This question having been so disposed of in the Court of Session, and an appeal taken to the House of Lords, but never moved in, and finally dismissed ten years previous to the present appeal: Held, that these proceedings did not constitute a *res judicata* in bar of the present action.

A lease of the coal of Woolmet was granted by the Magistrates of Edinburgh to John Biggar. The appellant is now in right of the Magistrates, and the respondent in right of Biggar. The renewal of the lease to the respondent contained a clause, in the exact same words as the original lease to Biggar, viz. :—“ All and haill the coal that is within the
“ lands and barony of Woolmet and Hill, *excepting always*
“ *the coal lying within the parks, gardens, and inclosures of*
“ *the said lands and barony of Woolmet*, unless the consent
“ of the said Earl of Wemyss be first had and obtained
“ thereto.”

The appellant conceiving, under the meaning and construction of the above clause, he had a right to work the coal within those grounds excepted and reserved, proceeded to sink a pit for this purpose, when the respondent applied

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by suspension and interdict, to have it stopped, alleging that this was not the true meaning of the lease; that the coal within the grounds excepted was reserved merely to prevent injury to these grounds from working it; but did not reserve to the Earl a right to work that coal himself; but, on the contrary, as was evidenced from the clause, “unless the consent of the Earl of Wemyss be first had and obtained thereto,” if the coal was wrought at all, no one but the tenant was empowered to do so. The tenant was not to work that coal without the landlord’s consent, neither was the landlord to work that coal during the lease. In point of fact, he stated that the Earl having, in sinking his pit, cut through a bed of gravel, a run of water was created, which, running down the pit, would communicate to the respondent’s workings, and be for ever drawn by his engine.

The Lord Ordinary remitted to men of skill, who reported that “the sinking of this pit would have the effect of communicating *an additional quantity of water* to Sir Archibald Hope’s engine from the surface of the earth, and from cutting through the various strata of metals between the surface of the coal.” And upon this report, and also upon the construction of the lease, the Court held that the appellant was not entitled to put down pits within the parks and gardens of Woolmet. An appeal was taken to the House of Lords, but never moved, and in consequence dismissed. When, ten years afterwards, the appellant again raised the question in the present declarator.

Dec. 11, 1792. The Lord Ordinary, of this date, pronounced this interlocutor:—“Repels the preliminary objection of a *res judicata* in this case: And upon the merits of this cause, after giving what the Ordinary thinks a fair and rational construction to the original lease in 1723, by the town of Edinburgh to John Biggar, his heirs and assignees, and in particular to the excepting clause in that lease, which gives rise to the present question: Finds, that as by this exception, the tenant was on the one side excluded from working the coal, within the excepted grounds without the consent of the master, so, on the other hand, it neither was nor could be the understanding of parties, that the master was to be left at liberty, during the currency of the lease, without the consent of the tenant, to work those coals either by himself or others, at discretion, which might be attended with very prejudicial or ruinous consequences to Mr. Biggar, or his successors, in the after-

“ working of the main coal of the barony of Woolmet, con-
 “ fessedly set to them without any imposition or restrictions,
 “ and which appears to have been the ground upon which
 “ the Court proceeded when they granted the interdict
 “ which has been pled in bar of the declarator ; and, there-
 “ fore, on these grounds, assoilzies the defender.” On re- Feb. 12, 1793.
 claiming petition, the Court adhered.

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Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—As the lease contains a clause of “ All and hail the coal that is within the lands and barony of Woolmet and Hill, excepting always the coal lying within the parks, garden, and inclosures of the barony of Woolmet, unless the consent of the said Earl of Wemyss be first had and obtained thereto,” this amounts to an absolute and unqualified reservation of the coal in question, and the appellant, as proprietor thereof, was entitled to work the same. And it is no answer to this to say, that the purpose for which this reservation was inserted was quite different from giving the landlord a right to work the coal, because the reservation, as explicitly expressed, is general and sufficient not only to comprehend this purpose, but all other lawful purposes. The respondent admits that he has no title to work the reserved coal himself. It is equally clear that such a reservation, in a lease, must always have in view a right to work on the part of the landlord, especially where there is nothing mentioned expressly to exclude this : And what the respondent aims at is to obtain a monopoly of his coal to the exclusion of the landlord’s right.

Pleaded for the Respondent.—The original purpose of reserving the coal was to give the proprietor a surety that his parks and inclosures of Woolmet would not be damaged from working ; but it is quite clear from the meaning of the lease, that the *whole* coal of Woolmet was given in lease to the respondent, except the right of working that part of it under the parks and gardens of Woolmet, without the proprietor’s consent. This last clause, “ unless with the proprietor’s consent,” showed that the *whole* coal was let, and it would, in these circumstances, be extraordinary, and not consistent with the true *bona fides* of the transaction, to see both the proprietor and lessee working the same coal ; or after a lease to a tenant, for the landlord to work the coal as here intended, to the great injury and probable destruction of the tenant’s right. Such was never the intention by the original lease, nor by the renewal of it to the respondent.

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After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed,
with £100 costs.

For Appellant, *Sir John Scott, Wm. Tait.*

For Respondent, *R. Dundas, W. Grant, Wm Dundas.*

NOTE.—Unreported in Court of Session.

JOHN SMART,	.	.	.	.	.	<i>Appellant ;</i>
The Hon. WALTER OGILVY,	.	.	.	.	.	<i>Respondent.</i>

House of Lords, 26th October 1796.

SALE BY SAMPLE IN OPEN MARKET—LANDLORD'S HYPOTHEC.—The appellant, a corn merchant, purchased from the respondent's tenant, a farmer, a quantity of grain by sample, in public market. Part of the grain was delivered, and bill granted for the price, and was paid. On failure of the tenant, Held, in an action raised by the landlord *against* the purchaser of the grain, that the latter was liable to pay the value of what was delivered, the landlord having a right of hypothec over the same for the rent of which it was the crop; and this, although the claim was not made *de recente*, but *ex intervallo* of two years.

The respondent was landlord of a farm, rented by James Inverarity as tenant, from whom the appellant, a farmer and grain and corn factor, purchased, on 25th July 1789, a quantity of grain by sample, in public market. A bill for £60 (part of the price) was given on the occasion. But only part of the grain was delivered, not amounting in value to the £60 bill, when embarrassed circumstances prevented Inverarity from delivering the remainder.

In February 1791, a year and seven months after the sale and delivery of part of the grain, the respondent (Inverarity's landlord) raised an action against the appellant, setting forth that his tenant was owing him £125, as the half year's rent of the farm, for crop 1788, payable at Martinmas 1789, and, as by law, the corns growing on the farm are hypothecated for the rent of that crop of which they are the product, the intromitters and purchasers from the tenant of such

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corn, are liable to the landlord for the value or purchases, and that the appellant having purchased bear and oats from the tenant, he was liable for the value of what had been delivered to him under that sale, and concluding for £55 as the value thereof; accordingly, decree in absence (by default) having been pronounced, a suspension was brought by the appellant, in which he pleaded that the grain was fairly purchased in open market, on Friday, the market day, and that he had granted his bill for £60, which had been duly paid, and the sale thus effected, was sufficient to exclude the landlord's hypothec, as a sale in public market. And even if the landlord had right by his hypothec to question the sale of the grain of his tenant in public market, yet this must be done *de recente*, and the *mora* of nearly two years was sufficient of itself to defeat the right, if it existed. Answered, That the purchaser here was a neighbour farmer of the tenant, and was acquainted with him and his circumstances, and had bought the grain under circumstances which inferred collusion between them.

The Lord Ordinary, without allowing a proof, dealt with the case on the abstract question of law, and "Found the May 14, 1793. " letters orderly proceeded, and decerns (against the ap-
" pellant). But, in respect of the delay in claiming upon
" the hypothec, finds no expenses due, but that for extract,
" for which decerns." On reclaiming petition, the Court Dec. 10, —
adhered. On second petition they also adhered. Jan. 14, 1794.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The grain having been purchased in public market by sample, it became the property of the appellant, free of all questions as at the instance of the landlord, and this on the faith due to sales in public market; and unless the respondent can prove what he alleges, namely, collusion between these two parties as neighbours, full effect must be given to the sale. There is no evidence offered of any such fraud or collusion, and no evidence that the grain, as alleged, was bought at Inverrarity's farm in March preceding. The appellant admits that he looked at the grain in March preceding, but no sale took place until the one in July in public market, as above. But even supposing it were proved that the sale took place at the farm in March preceding, as is alleged, yet, that sale being fair and *bona fide*, must be held to be unimpeachable in law, after the *mora* of the landlord not timeously claiming under his right of hypothec. The corn was delivered a

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few days after the sale. It was publicly and openly carted away, and yet he took no steps for nearly two years; the fact being, that at the time there was grain left on the farm more than sufficient to satisfy the present claim, which of itself ought to bar this action.

Pleaded for the Respondent.—The landlord's hypothec is a *jus in re* in the crop, for security of the rent of the year which produces it, and this being the established law in regard to his hypothec, every purchaser from the tenant must know, that this right continues until payment of the rent, as is laid down by Erskine; and no delay in availing himself of this right, can in any degree defeat it, for action will lie even at the distance of years. Besides, the reason which gives all faith and effect to sales in public market, being a probability that at a public market purchasers do not know the condition of those with whom they deal, that reason totally fails here; because, in point of fact, the parties to this sale were neighbouring farmers, and Inverarity's embarrassed circumstances were well known to the appellant. In point of fact, the sale appears to have been got up collusively, for the purpose of defeating the landlord's hypothec, because it actually took place in March preceding, on Inverarity's own farm, instead of being a sale in public market by sample, which latter was a mere pretence, resorted to by way of giving a form to the transaction, and, therefore, no sale in public market took place. But, assuming that it is established that this was a sale in public market, it is by no means clear, that such a sale by *sample only*, would be effectual to defeat the landlord's hypothec, because the same reason does not hold for giving it any privilege; for after a sale by sample, there is a delivery *post intervallum*, and opportunity to inquire into the circumstances of the seller, and the situation in which he stands with his landlord. But, independently of the strong presumption that a sale by sample, after having inspected the heap, can be nothing but an artifice, it stands admitted by the appellant's own showing, that there had been an investigation at Balbegno, and the bargain had at least begun there; so that the Court below were certainly well entitled to hold, that in that case the appellant was bound to have satisfied himself as to the condition of the seller, agreeably to the general rule of law. *Quicunque scire debet conditionem ejus, cum quo contrahit.* And there can be no doubt that the situation of In-

Ersk. 2, tit. 6
§ 60.

verarity was sufficiently known to the public, to render the appellant inexcusable, if he did not inquire into it. The fact that he had left sufficient grain to satisfy this arrear of rent, never having been relevantly averred, so as to go to proof, was rightly disregarded.

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After hearing counsel, it was
Ordered and adjudged, that the interlocutors complained
of be affirmed, with £100 costs.

For Appellant, *J. Anstruther, W. Adam.*
For Respondent, *Sir J. Scott, R. Dundas.*

JOHN JAMIESON & Co. Merchants, Leith, *Appellants ;*
JOHN LAURIE, Shipowner, . . *Respondent.*

House of Lords, 10th November 1796.

DEMURRAGE OR DAMAGE.—A claim was made by the owner of a vessel, against the freighters thereof, for demurrage, on account of the detention of the vessel beyond the time stipulated. Held, that the claim of demurrage ceases on the day of her sailing from her loading port; and though the vessel was obliged to put back after being two days at sea, and finally, frozen in for the winter, that this was a *casus fortuitus*, falling on the owners and not on the freighters of the vessel, and for which the latter could not be held liable, reversing the judgment of the Court of Session.

A hundred tons of Siberian tallow were purchased by the appellants from Atkins E. Regail & Co. of St. Petersburg, who, in answering their communication, stated :—" We shall expect shipping for it next August." In the month of July, the appellant chartered the respondent's vessel, the " Bell of Leith," Captain Anderson, to proceed to St. Petersburg for the tallow, with written instructions to the captain to deliver the enclosed letter to Atkins E. Regail & Co., who were immediately to ship the tallow, and give him what deals and battens they have to fill up the ship. Also a provisional order for forty tons of iron, " If they can

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“ ship it in time.” If he could not get any other cargo, he was “ directly to load without it ; Observe, you must be clear, and sail before 1st September, N. S., as the premiums of insurance advance greatly after that date.” The ship proceeded on her voyage, and arrived at her port of destination on 22d July ; but the cargo of tallow, which is brought from Siberia to the sea ports, by floating it down the rivers, in consequence of the great drought of that season, had not arrived at Cronstadt, and the cargo was not ready for delivery until the beginning of October. A protest was taken by the captain for all charges, damage, and detention that may arise in consequence. At their desire, the ship was detained for her cargo. The tallow arrived at Cronstadt on the 12th October. It was all shipped, and the vessel cleared out and ready for sea on the 16th October. She then sailed for Leith, but after a few days at sea, she returned to port, in consequence of having met contrary winds ; after which, the frost setting in, she was frozen up for the winter, and was detained until the month of May of the following year ; in consequence of all which, the appellants suffered great loss on the cargo, besides being liable to the owners of the ship “ Bell ” for demurrage for the whole period she was detained at Cronstadt, at the rate of £3 per day.

The respondent, as owner of the vessel “ Bell,” made a claim against the appellants for demurrage and damages, and raised action, first before the Court of Session.

In defence, it was stated :—1st, That the shipmaster being bound by his instructions to wait no longer for the cargo than the 1st September, was bound to have set off on his homeward voyage, if the cargo was *not* ready by that time, after taking protest. 2d, That if he thought proper to wait longer, he could only claim demurrage, in the same way that any other shipmaster was entitled to do, and was not entitled to claim demurrage after the ship received its cargo : it being an established rule of mercantile law, that the claim of demurrage ceases the moment the vessel gets her cargo on board, and is cleared for sea.

Dec. 11, 1792. A proof was gone into, to show that this latter was the universal understanding among shipmerchants.

The Lord Ordinary, (Lord Justice Clerk), after various interlocutors, pronounced this interlocutor :—“ In respect of the depositions of sundry merchants and shipmasters, who gave it as their opinion, that the demurrage of a ship

“ ceases on the day of her sailing from the port of her loading, 1796.
 “ and that if a ship should thereafter be put back by contrary
 “ winds, and detained by the frost setting in, the same is con- JAMIESON, &c.
 “ sidered as a *casus fortuitus*, that must affect the owners, and v.
 “ that no opinions to the contrary appear from the proof: alter LAURIE.
 “ the former interlocutor, and finds that the charger is not
 “ entitled to demurrage after the 29th October 1787; and
 “ appoint parties to be ready to debate on the extent of the
 “ damage or demurrage, claimable upon the suspenders on
 “ account of the detention, prior to that period.” But, on
 reclaiming petition against this interlocutor to the Court,
 “ the Lords found:—“ That the opinion of merchants, Jan. 16, 1794.
 “ founded on by the respondent, does not apply to this cause :
 “ Find, that by the original bargain of affreightment, the ship
 “ ought to have been loaded and ready for sailing on or
 “ about the 1st of September: Find, that it was by de-
 “ sire of Atkins E. Regail & Co. that the ship was detained
 “ beyond that time: Find, that it was not owing to any
 “ fault of the master, but to contrary winds, and the frost
 “ setting in, that the ship did not make out her voyage, and
 “ that if the ship had sailed by the 1st of September, or
 “ soon thereafter, it is presumable the disasters by which
 “ she was detained through the winter would not have
 “ happened; and that, therefore, any damage, thence
 “ arising, must fall upon suspenders: And, therefore, upon
 “ the whole, find the letters orderly proceeded, and de-
 “ cern.” *

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—“ This is a question about demur-
 rage. The first interlocutors are strongly founded on reason. The
 last interlocutor is entirely founded on the *ex parte* opinions of
 merchants, produced by the defender, which do not go to the precise
 case in hand, but to the general case of a ship sailing upon her voy-
 age, without any known or actual cause of impediment existing at
 the time. But if, in consequence of the detention before sailing,
 the ship has been put into a situation that makes any attempt to sail
 ineffectual and abortive, it would be against all reason and justice
 that the person, owner of the vessel, should suffer the loss thence
 arising, and that the party who occasioned it should be free. It is
 no matter whether we call it damage or demurrage. It is a loss
 arising by breach of contract, negligence, or other fault, imputable
 to the freighter. The ship is entitled to its hire, as much as the
 men to their wages, and the contract, whether in writing or not, or

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Against this last interlocutor the present appeal was brought.

Pleaded for the Appellants.—By the letter of affreightment, which was the contract between the appellants and respondent, the captain had express instructions not to wait longer, and he was not bound to wait longer for the cargo from the foreign merchants than 1st September, N.S. He was ordered to “observe, that he must be clear, and sail before that day,” and if he could not get the cargo of tallow, he had express instructions and liberty to load his ship with other goods, and to execute orders for other merchants; but these instructions expressly mentioned, that “the ship must not be detained for them.” The captain was sensible of this himself, because, in his protest taken on the spot, he declares “that *his lie days by his letter of affreightment were expired.*” After this he was bound to return home, or he might have advertised the ship as a general ship, ready to take on board goods for freight. But, in place of this, he thought proper to remain; and, having done so, he can only claim demurrage according to the universal rule and custom of merchants—namely, up to the day that the vessel receives her cargo, and is cleared for sea; after this, no claim lies, as the moment the vessel receives her cargo and sails, all claim to demurrage is at an end, and any accident happening thereafter, which may detain her, must, as a *casus fortuitus*, be borne by the shipowners. Here the “Bell” sailed with her cargo on the 16th October, and though she was some days thereafter obliged to return

whether by the month, or for an entire voyage, is entitled to a liberal construction, or rather, to be favourably interpreted for the owners, so far as regards this article of hire. Molloy, B. 2, c. 4, §. 12. The distinctions made in the answers are too subtile, and not to be found in any law book, nor do they apply to all circumstances.

“The ship in question attempted to sail, but could not. The master did every thing in his power, but in vain. The sailing was not effectually begun till the month of May, and it is then only that the claim of damage ceases. I am therefore for altering.”

LORD JUSTICE CLERK.—“Of same opinion.”

LORD ESKGROVE.—“Of same opinion.”

LORD DREGHORN.—“Of same opinion.”

LORD CRAIG.—“Of same opinion. It is not properly demurrage, but damage.”

Vide President Campbell's Session Papers, vol. lxxii.

to port from contrary winds, yet no demurrage lies for the consequence of that return; for that would be to hold the appellants liable for the contrary winds, and the frost setting in. And the usage and practice of merchants, and the evidence produced, that this claim ceases when the vessel is loaded for sea, is decisive of the present question.

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Pleaded for the Respondent.—By the original bargain of affreightment, the ship ought to have been loaded and ready for sailing by the 1st of September; and, having to wait for her cargo, it not being ready when she arrived, she would have proceeded without it, after her lay days had expired, had she not been detained by the desire of Atkins, E. Regail & Co. for the cargo. And as when she did receive that cargo, and proceeded to sea, it was no fault of the master, but because of contrary winds, and the frost setting in, that she did not make out her voyage, and as this would not have happened had her cargo been ready at the time stipulated, because, had she sailed on 1st September, it is presumable that no such disasters would have happened, the damage must therefore fall on the appellants.

LORD CHANCELLOR LOUGHBOROUGH said,

“ My LORDS,

“ The appellants in this case were sued to make good a claim of demurrage, stated to have been incurred by the detention of a ship belonging to the respondent, *freighted by the appellants* to bring a cargo of tallow home from the Baltic, the ship having been detained during the winter of 1787, by the severity of the weather, and the setting in of the frost.

“ I am not able to concur with the judgment and opinion given in this question by the Court of Session, though the judges were unanimous. One of the judges, indeed, at one period, pronounced an interlocutor in favour of the appellants; but he afterwards coincided in opinion with the other judges, when the final interlocutor was pronounced.

Lord Justice Clerk (MacQueen.)

“ The circumstances of the present case are as follow:—The appellants, in 1787, were informed by Messrs. Atkins and Son of London, that their partners, Messrs. Atkins, Regail & Co. of St. Petersburg, had made a purchase of a quantity of tallow, deliverable in August, which they conceived might suit the appellants; they state the prices, and intimated that if the terms were agreed to, they must be paid in cash, to answer the drafts of the partners in St. Petersburg. Upon the prospect of that adventure, the appellants agreed to take 150 tons of this tallow, at the prices mentioned, and to put Messrs. Atkins & Son in cash, to answer the drafts of their correspondents. Advice

1796. was also sent to the partners at St. Petersburg, by the appellants,
 ——— and in a letter from Atkins, Regail & Co., which was the last on
 JAMIESON, &C. the agreement for the purchase, it appears that they are content with
 v. the price, and they state, 'We shall expect shipping for it in
 LAURIE. 'August next.'

"The appellants, having full reliance that the tallow would be ready for delivery accordingly, and having supplied the house in London with money in advance, they proceeded to freight a ship belonging to the respondent, for the purpose of bringing home their purchase. The tallow was their principal object in sending to the Baltic, though it did not complete the lading; and the shipmaster was provisionally allowed to bring home also forty tons of iron, and fifty or sixty tons of goods; and, if wanted, he might also ship a quantity of deals and battens for the appellants. About these last, however, from the terms in which they are mentioned, it is very plain that the appellants were indifferent; and that the order was given with no view but that the cargo should be complete, and for none of the articles was the vessel to be detained a single day. To the tallow was the shipmaster's attention particularly directed. No charter party was entered into between the freighters and the shipmaster, nor is there written evidence of the specified terms of agreement between them. It does not appear what freight was agreed to be paid, but this matter was settled by the parties, and did not enter into the dispute between them.

"But though there was no charter party, there were still written documents of this agreement. The master was furnished with a letter of instructions, from which the views of parties appear. This letter informs him that he was addressed to Atkins & Co. of St. Petersburg, that they would ship with him 100 tons of tallow, that he has a provisional order for forty tons of iron, *if it could be shipped in time*; and that he was permitted to take general goods to the amount of forty or fifty tons, *but the ship was not to be detained* for them, and this letter contained this direction:—'Observe, you must 'get cleared, and sail before the 1st of September, new style,' and the reason for this is given,—'As the premiums of insurance advance greatly after that date.'—'About this we write particularly 'to Messrs. Atkins, Regail & Co., and we hope they will attend to 'it.'

"The letter to be delivered to Atkins, Regail & Co. was in the same terms, and it repeats and enforces the injunction, which is imperative,—'As our insurance advances greatly on the 1st of September, and again on the 18th ditto, new style, you must have him 'cleared by that time.'

"The ship accordingly proceeded on her voyage, and arrived in St. Petersburg in the end of July, but the tallow, which was the principal object, had not arrived there from Siberia, and Atkin & Co. when complained to of this, returned an answer, which came very ill from them,—that the ship had been dispatched too soon. The ship,

therefore, was obliged to remain, as there was no cargo but the tallow, which, at that period of the voyage, she could proceed with homeward.

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“ The month of August wearing out apace, and no appearance of the tallow, the shipmaster appears to have been in doubt what course to take, but takes a formal protest against Atkins, Regail & Co., for not having loaded him according to his instructions,—a very regular and prudent step on his part,—and continues to wait.

“ I apprehend the master had conceived himself bound not to come away without the tallow, but no power could have hindered him from doing so. And Atkins and Regail, who were the correspondents, and not the agents of the freighters, would, in the case of his coming away, have been liable to the appellants, for non-performance of contract and damages. Though the agreement of the respondent was to this extent, that the shipmaster was the servant of the freighters, and acting for those who were liable to the owner for the consequences.

“ The master, who appears to have been very active, complains very sensibly to the owner of the want of a charter party: ‘ No man,’ says he, ‘ ought ever to come here without a charter party; ‘ if he does, he is a fool.’ The idea, I believe, had occurred of general freight being due to the owner, to which, in my apprehension, he was entitled. Freight must have been paid to him, and the freighters would have had remedy against the shipper for breach of contract, according to the terms of that contract. But, the ship being freighted for a given space, the shipmaster was not bound to remain longer, but might have come away, and the owner have had his remedy against the shipper. Unfortunately, however, he stays, and waits for the tallow; and here I must remark, that he was not lucky enough to get any writing from Atkins, Regail & Co. ordering his stay, or to show that any attempt was made by them to prevent his going. But what could they have done? They had no authority over the captain, and the owner would have had his remedy. They, indeed, the captain depones, insisted upon his staying for the tallow, and he submits to their opinion. There was no new contract entered into, but Atkins and Regail must have either been bound to the owner for the detention, or the shipmaster must have acted wrong.

“ The captain waits,—the tallow at last arrives, and the captain having used all expedition, receives the cargo on board, and sets sail. About forty other vessels sailed at the same time; of these thirteen make out the voyage, but some twenty or more, among which the respondent’s vessel is one, put back, and that without any fault being imputable to the shipmaster, and the frost setting in, he is prevented from leaving the Baltic; he winters at Cronstadt, and does not get home till June in the following year.

“ Upon these facts the action in the present case was founded,

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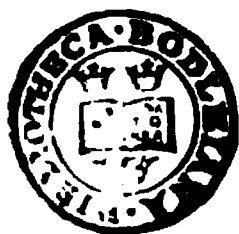
and in it the respondent insisted against the appellants, in the first place, for freight; but this part of the claim was afterwards adjusted, as I have already mentioned, between the parties; and, 2d, for demurrage, or damages for detention of the ship at Cronstadt. When this question came first to be decided by the Judge of the Admiralty Court, he mentioned as the ground of his decree, which was in favour of the respondent, that the extraordinary detention of the vessel at Cronstadt, which ultimately occasioned her detention there, arose by the fault of Atkins, Regail & Co., for whom the appellants were answerable, and in this manner the cause was ultimately determined by the Court of Session. It probably was owing to the detention of the tallow that the ship was detained, and for this Atkins and Regail were answerable in damages.

“ That damage was liable to be paid to the owners for the detention of the vessel, was never doubted in this case to be matter of law; but the answer made by the freighter is also well known law, namely, that after the commencement of the voyage, no claim for damages could be made. This question has, in the present case, been much agitated, and distinctly argued at the bar, and it was agreed on both sides, that there was no claim for damages after commencement of the voyage.

“ But it was said for the respondent, that the proceedings in the Court below, and interlocutors pronounced in favour of the respondent, might be supposed to be for damages on account of the detention. But I cannot distinguish between the damages suggested, and demurrage in this case. The term demurrage is generally applied to the sum liquidated between a freighter and owner, antecedently settled in a charter party. The ship is to be loaded by such a day, and days for demurrage are appointed, and the sum specified to be paid for those days, without regard to the actual damage; but if there is no agreement betwixt the parties, the sum paid for detention is exactly in the same proportion as where it is liquidated betwixt themselves as to freight.

“ I have such respect for the interlocutor of the Lord Ordinary, of the 11th December 1792, which was afterwards departed from, as to think that, in matter of law, it was well founded; and as this is a question of very general importance, I shall in few words state my ideas upon it.

“ The law of demurrage for detention is reasonable, as I know it to be general law, and there are no circumstances to take this case out of the general rule. This general rule too was fully proved to be the understanding of merchants in the proof taken in the cause. There are two modes of freighting a ship,—1st, Where a ship is hired at so much per month, and where hired for time, no damages are incurred for detention. 2d, Where a ship is hired for a certain sum to complete a voyage; and this is the more common practice, and the mode of the voyage in question.



“ Charter parties vary with regard to the sum payable, according to the extent or risk of the voyage, and by these, the consideration to be given by the freighter must be governed. But there is also a material consideration, namely, when the homeward voyage is to commence; for voyages are much shorter and safer at one season of the year than at another, and there is a consequent difference in the rate of insurance. Thus, in the West India trade, there are different rates of insurance paid for different periods. The first is about the 25th of July, or 1st August, when the rate of insurance is smaller; and the next sometime in September, when it is higher; this is of course, because, by setting off at the first period, the voyage will be made out more early in the season, and later if commenced at the second period.

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“ So, in the Baltic trade, the early voyage must be commenced by the 1st of September, after that the insurance rises at two several times or periods. In the present case, the respondent's ship was freighted for the first period, the voyage to be commenced at low insurance on 1st September, when the freighter had assurance, and the shipmaster had assurance that the cargo would be ready. If a charter party had been made in this case, and the ship had been detained after the running days, then demurrage would have been due to the owner.

“ By the first of September, the cargo then was to have been loaded, and demurrage has been distinctly claimed from that date till the commencement of the second voyage. But I am by no means clear, that demurrage in this case was due after the first of September. The captain, proceeding in this case to load the ship, must be considered in a question between the owner and freighter, as the servant of the owner; and, in all questions between the owner and shipper, he must be considered as the servant of the freighter. As the cargo was not ready in time, he was to judge, from the documents and means of knowledge in his power, of the degree of peril in the voyage, and he might have refused to take it if he thought proper.

“ The captain might think it right to wait for the tallow; but he might also think demurrage a good thing in determining his option, especially as there were forty other captains who seemed to have judged it proper to act as he did. After he gets the tallow, it appears he was very active, and did every thing in his power to get away. As he agreed, however, to take the cargo, and sailed, it cannot be considered in any other view than as a prolongation of the one term appointed for sailing; and, by sailing, when he did, on the 29th October, it must be considered that he undertook to perform it on the same risk as if it had been commenced on 1st September. A contrary rule would, in my opinion, be totally hostile and destructive to commerce, if the freighters were to be liable for any misfor-

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tune that might happen to the vessel which had sailed after such a prolongation, as in this case. If the ship should have been lost, or detained, after sailing on 29th October, in my opinion, no other action would lie against the freighters than if she had been lost or detained after sailing on 1st September. Aitkins and Regail were to blame for the delay in the cargo; but the captain, who, as to them, was the agents of the freighters, took the cargo at last, and agreed to sail.

“ If the ship had sailed on the 1st September, it is probable that she might have made out the voyage; but the freighters cannot be considered to be the insurer of the safety or endurance of the voyage; of these, the owner himself must form his judgment, and act accordingly.

“ If, in law, detention shall entitle the owner to demurrage, after commencement of the voyage, for the length of it, or any loss sustained by the owner, the detention for one day must have the same effect as a detention for two months. And, in this case, where there was a precise contract, if the master had sailed sooner than he did, but after the 1st September, and the ship had been detained, the same consequences, by this way of reasoning, would follow upon the freighters. But were the law so, it would be impossible for the merchant to know at what risk he was undertaking to freight the ship, and trade could not be carried on with safety.

“ Here the ship was freighted at low insurance, to sail at the early period, and not being then loaded, the master acted right in taking the protest which he did. There was no order to control his stay, although the ship might not even have been bound by such order. But as Atkin & Co. were not the agents of the freighters, but adverse contracting parties, Jamieson & Co. would not have been bound by their acts, but the owner might have had damages against them.

“ The captain, however, rashly agrees to wait. I do not mean to impute any blame to him—it was a mistaken idea of his orders. But this conduct has been most unfortunate for the freighters; if he had come away in September, the appellants, who, it was agreed on all sides, were totally free from blame, would have sustained no loss. But, by the captain’s acting as he did, very considerable loss has arisen to the freighters by the detention of their tallow, and a fall in the price of that article, by which they are sufferers to the amount of near £1200, as seems admitted by the respondent.

“ In the course of the argument, it was taken for granted by the respondent, that the appellants would be entitled to recover from Atkins and Regail the damages that had been occasioned by their bad conduct. But this was impossible, after the captain received the cargo on board, and agreed to sail.

“ I have, therefore, to propose to your Lordships, that the whole interlocutors complained of by the appellants may be reversed, and

the parties will then return to the Court of Session and settle the quantum of demurrage, in terms of the interlocutor of the Lord Ordinary of 11th December 1792.

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“It is necessary for me to state, however, respecting that interlocutor, that though it is perfectly correct in finding that the demurrage ceases on the day of sailing, and the detention was a *casus fortuitus*, which must fall upon the owners, yet his Lordship was mistaken in resting this judgment upon the opinions of the merchants examined in this cause, and not, as it ought to have been, on the foundation of general law.”

After hearing counsel, it was

Ordered and adjudged that the several interlocutors complained in the appeal be *reversed*. And it is further ordered and adjudged, that the interlocutor of the Lord Ordinary, of the 11th December 1792, be affirmed: And it is farther ordered, that the cause be remitted back to the Court of Session in Scotland to proceed according to the said interlocutor of the 11th December 1792.

For Appellants, *J. Adair. Wm. Adam.*

For Respondent, *Sir J. Scott, R. Dundas, Geo. Ferguson.*

CHARLES FERGUSON, JOHN FORDYCE, WM. }
GEMMELL, and DUNCAN DAVIDSON, Esqs. } *Appellants;*
of London, Trustees of the late Andrew
Grant, Esq. of Granada, . . . }

DOUGLAS, HERON & Co., and their Factor, *Respondents.*

House of Lords, 11th November 1796.

SEXENNIAL PRESCRIPTION—INTERRUPTION—FOREIGN ADMINISTRATORS.—FORUM.—(1.) Held, in counting the six years of the sexennial prescription, that the *terminus a quo* in reckoning the period, is from the last day of grace after the bill falls due. (2.) Also held, in the special circumstances of this case, that English administrators residing in England, acting under an English will, proved in the Prerogative Court of Canterbury, in reference to an estate in Granada, and beyond the jurisdiction of the Court of Session, were not liable to be called to account in the Supreme Court of Scotland, reversing the judgment of the Court of Session; but opinion expressed, that the Court of Session were quite competent to judge in a case where either the persons of the executors, or the effects of the deceased, are within their jurisdiction, no matter where the

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will was made or proved. And opinion indicated, that the present question, and the justice of this case, lay in these executors having nothing to do with Baron Grant, the debtor in these bills; and until a connection was established between him and Andrew, no claim could lie against the latter's executors.

Baron Grant accepted two bills for £500 each, to John Fordyce, Esq., which bills being indorsed by Fordyce to the respondents, bankers in Ayr, were protested when they fell due, on 23d July 1772, (being the third day of grace), for nonpayment.

Baron Grant having died without paying these bills, action was raised on 23d July 1778, against his brother, Andrew Grant of Granada, on the passive titles, and likewise against Mr. Fordyce, as drawer of the bills. In defence, Fordyce produced a discharge, and Mr. Grant denied that he represented his brother. Matters thus stood, when Andrew Grant also died. The action was again renewed in 1790, by a summons of wakening against his widow and children, but not proceeded with, as the heir of Andrew Grant offered to renounce his succession. In 1792 the present action was raised against his trustees, the appellants, who all resided in London, and who had taken out letters of administration in the Prerogative Court of Canterbury. The defences stated were,—1. That the appellants being foreign administrators, residing in England, and acting under letters of administration obtained from the Prerogative Court of Canterbury, in regard to foreign estate situated in the island of Granada, were not liable to be called on to account for their intromissions with that estate by the Courts in Scotland. 2. The bills were prescribed. 3. They were discharged, because Douglas, Heron & Co. had ranked on John Fordyce's sequestrated estate upon them, had accepted a composition in full, and had discharged the debt. Answered: 1. It has been settled in the case of *Morrison v. Kerr*, Feb. 1790, (M. p. 4601), that an English administrator might be sued in the courts of Scotland. 2. That the bills were not prescribed. That it was sufficient to commence action *within* six years of the last day of grace, counting the said six years in terms of the statute 1772:—"From and after the terms at which the sums in the said *bills* or *notes* became exigible." The bills here being dated 16th May 1772, at sixty-five days date, they became due upon the 20th July 1772, and the summons being executed on 23d July 1778, that is, not till six years and three days after the bills had become due, it was

raised within the six years within the meaning of the statute. 1796.
 Besides, even if prescription applied, it was interrupted by _____
 the claim entered upon the bills in the sequestration of Mr. FERGUSON, &c.
 Fordyce's estate, in consequence of which a payment was v.
 made upon them in 1775, it being provided in terms of the DOUGLAS,
 act 1783, § 36 : " That the making production of the grounds HERON & CO.
 " of debt, along with the oath, shall have the same effect
 " as to interrupting prescription of every kind, from
 " the period of such production, as if a proper action
 " had been raised on the said grounds of debt against
 " the bankrupt, and against the trustee." 3. That
 the discharge by the composition paid on Fordyce, the
 drawer's estate, did not relieve and discharge the accep-
 tor, against whom full recourse was reserved. Replied :
 1. That though it had been decided in the case of Morrison,
 that an English executor might be sued in Scotland, this
 depends on the facts of the case ; and the facts of that case
 are totally different from those here. Mr. Grant's estate is
 situated in the island of Granada, subject to the laws of
 England. The administrators, although they were some-
 times in Scotland, their chief residence was in England,
 where the administration was still going on, whereas, in
 Morrison's case, the funds were all collected, and brought
 to Scotland, and the administrator was residing there ; so
 that Morrison's case can have no application to the present.
 2d. That it was by no means so clear, that in counting the
 running of the six years, the three days of grace are not to
 be excluded, because, it is obvious, that protest may be
 taken, and diligence raised, within the days of grace, against
 the acceptor, a fact inconsistent with the supposition that
 the contents of the bill are not then "*exigible*;" and as to the
 interruption pleaded, on the ground of the debt having been
 ranked on Mr. Fordyce's estate, it is clear that the respondents
 are not entitled to the benefit of this clause of the act 1783,
 because they had never produced their grounds of debt, or
 oath of verity, in terms of the statute quoted. But, suppos-
 ing it to be a good interruption in any question with Mr.
 Fordyce, it does not follow that the interruption as to him,
 the drawer of the bill, was a good interruption as to the
 acceptor. And, 3. The payment of composition and discharge,
 was doing diligence certainly against Fordyce, the drawer
 of the bill ; but diligence used against A, the drawer, is not
 diligence used against B, the acceptor, to whom it is *res inter*
alios, and the acceptor B has, therefore, nothing to do with it.

The Court pronounced this interlocutor:—" Find that Nov. 19, 1793. "

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 " in question, only began to run from the third or last
 " day of grace ; and therefore repel the plea of prescription,
 " pleaded for the petitioner ; repel also the objection stated
 " to the competency of this Court : find the defenders, who
 " have accepted of the trust, liable in the sums pursued for,
 " and decern ; but, in respect it is alleged by Mr. Fordyce
 " that he never accepted of said trust, and not denied by
 " the other party, assoilzie him from this action, and
 " decern." * Several orders were then pronounced, of
 these dates, requiring the trustees to produce a state of
 Nov. 30, 1793. their accounts of their intromissions with the deceased Mr.
 Dec. 7, ——— Grant's estate, but they declined, whereupon the Lord
 Dec. 14, ——— Ordinary, to whom the case was remitted, of the latter
 Jan. 18, 1794. date, 22d February 1794, held them as confessed to have a
 Feb. 11, ——— sufficiency of funds to pay the debt ; and on two represen-
 Feb. 22, ——— tations his Lordship adhered.
 Feb. 28, ———
 Mar. 11, ———
 June 14, ———

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The appellants being English executors, acting under an English will, proved in the Prerogative Court of Canterbury, over estates situated in Granada, are only bound to account for their actings in the Courts of England ; and not liable to be called in an action regarding said estate, and administration in the Courts of Scotland. The case of Cartwright or Burroughs v. Sir Archibald Grant, 11th February, 1754, affirmed in the House of Lords on the cross appeal, 18th March 1755, decided the general point, that an English administrator was not bound to account in Scotland. And the case of Morrison, supposing it to have been well determined, is not applicable to the present case, because there the English administrator had recovered the whole estate of the deceased, carried it to Scotland, and had fixed his residence there ; but here the appellants reside in England, and are in the course of

Vide ante, vol.
i. p. 597.

Interlocutor, 19th November 1793.

LORD PRESIDENT CAMPBELL.—“ There are two points here,—1st, Whether English executors or trustees are accountable here ?

“ They are accountable every where ; and the only question in such cases is, Whether the Court can reach them with effect ? In this case it can, some of them being not only resident, but having heritable property here.

“ 2d point, How the sexennial prescription of bills is counted. It ought not to begin to run till the day after the expiry of the three days of grace ; and further, I think in this case, it has been interrupted.”—President Campbell's Session Papers, vol. lxxi.

executing the trust reposed in them. And it does not affect this, that the trustees are Scotchmen by birth, and some of them have an occasional domicile in Scotland; because the *forum originis* has nothing to do with the question, and occasional residence cannot constitute a domicile.

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2. But even if the action could be maintained at all in Scotland, the bills founded on are prescribed; the bills were payable on 20th July 1772, and no legal step was taken until 23d July 1778, that is, six years and three days after the bill became due and exigible. Besides, it is not very clear whether the action brought on the last of these three days was sufficient interruption, or whether this action brought in Scotland against Mr. Grant in Granada, whose domicile was there, and his estate there, at the time it was raised, was good for any purpose, and accordingly seems to have been abandoned for one brought in 1790, against his widow and children: And, 3d, The interruption founded on the claim lodged on Mr. Fordyce's sequestrated estate, could not have the effect of preserving the claim against Baron Grant. On the contrary, the respondents having agreed, without their consent, to accept of a small composition in full of their claim on Mr. Fordyce, have made the debt their own; and, consequently, if the action in 1778 was irregular, and the second action in 1790, also irregular, and the claim lodged on Mr. Fordyce's sequestrated estate ineffectual to preserve the claim against prescription as to Baron Grant, then there was no legal step taken, down to the raising of the present action, in order to interrupt that prescription.

Pleaded for the Respondents.—The competency of the Court of Session to try this question, cannot admit of doubt. The appellants, although English administrators, under an English will, are all of them Scotsmen by birth, and some of them have a proper domicile in Scotland; so that the Court of Session was both their *forum originis* and *forum domicilii*; and the mere circumstance of their having obtained letters of administration in England ought not to alter this fact. They are mere trustees, appointed to collect and realize his funds, and to pay his debts, and it would be somewhat extraordinary if a creditor in Scotland were not entitled to call on these administrators to pay them the debt due by the deceased, the more especially where the trustees, although chiefly residing in London, have residences in Scotland, where they occasionally reside; accordingly, in the case of Morrison and Ker, the Court of Ses-

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sion repelled the objection to their jurisdiction, stated by an English administrator, called in a suit before them. 2. The bills in question are not prescribed. They are in full force, because, as the *terminus a quo* of the sexennial prescription is counted, and runs from the last day of grace after the bill becomes "exigible," a summons for payment of the debt was executed on 23d July 1778, which was within the six years, computing from the last day of grace, which was sufficient interruption. 3. It was also interrupted by the proceedings regarding the claim on Mr. Fordyce, the drawer's sequestrated estate, where it was ranked, and a composition paid; and, according to the law of Scotland, proceedings against one of the obligants in the debt was sufficient to interrupt prescription against the other co-obligants, and therefore excluded prescription as to Baron Grant, and preserved the claim against all concerned.

After hearing counsel,

LORD CHANCELLOR LOUGHBOROUGH said,

"My Lords,

"This is a case in which bad premises seem to have been set up, from which no conclusion could be drawn.

"In 1772, a period of considerable distress in Scotland, this transaction took its rise. Two bills of £500 each, dated the 16th May 1772, were drawn by Mr. Fordyce, then a merchant in Edinburgh, and accepted by Mr. Grant, one of the Barons of the Exchequer, at sixty-five days' date, and, when due, were protested for nonpayment.

"It does not appear that any step was taken against the acceptor of these bills during his life. In 1773, Fordyce, the drawer, had some arrangement with his creditors, in which a sequestration took place, and in that sequestration the said bills were founded on by Douglas, Heron & Co., the respondents, then the holders of them, but of what nature their appearance was, is of little consequence to the present question. The respondents, however, received a dividend of 6s. 6d. in the pound, and thereupon granted a release as against Fordyce.

"The next move in this business is in 1778, Baron Grant being then dead. On the 23d July 1778, which was the last day of six years from the time when the bills fell due, the proceeding commences in the Court of Session, against Andrew Grant, as brother and heir to the late Baron Grant; and this is the first and only diligence against any person claiming under Baron Grant. Andrew Grant then resided in Granada, and Baron Grant had held estates there, managed by his brother. An appearance, however, was entered for Andrew, and, in a short answer given in in his name, to

was stated, that he was not heir to the baron, and would give in a renunciation ; but, in respect of his residence in Granada, that he craved time for this purpose. The time was accordingly enlarged till the 10th of *December* 1779. Had Andrew renounced, the creditors in that suit would have got access to all estate of the Baron under the jurisdiction of the Court, but could attach no estate in Granada.

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“ No further step, however, was taken in the action, and no renunciation was made. Andrew died about this time ; but the exact date of his death appears not.

“ From the 10th December 1779, the last mentioned date in the chronology of this cause, it stopped for ten years, till 1790, when it was, as it is termed, awakened. It had all this while been considered as asleep, and perhaps it might have been as well had it never been disturbed. The respondents, however, now called upon the widow and children of Andrew Grant, in the action which was awakened. What was the reason of their doing so I cannot imagine. Andrew, in the former action, had been cited as *heir* to his brother the Baron, but this seemed to be going out of the line of *heirs*, as he was not the next heir to the Baron.

“ The eldest son of Andrew, however, repeats that he is ready to renounce; but nothing is done in consequence. Soon afterwards, process was issued in the Court of Session, against three gentlemen in England, by a mode known and practised in that Court, and against one in Scotland, as writers and executors of a will made by Andrew Grant in Granada; which was proved by them in the Prerogative Court of Canterbury. An appearance was entered for these trustees. If these gentlemen had said,—We do not represent Baron Grant ; we have no effects of his; we are ready to renounce all estate of his ; take it, and welcome, and find the effects of your debtor where you can,—there must then have been an end of the action against them.

“ But, unfortunately, they set up a defence, and puzzled themselves, and, as appears from the proceedings, they puzzled the Court too. Instead of showing the incompetency of the action as against them, they set up a defence of prescription, and contended that the bills were cut off by the limitation of six years, no diligence having been done in that period. The phrase “ exigible ” in the statute, they contended, meant not the last day of grace; but the last day specified in the bills as the term of payment.

“ That argument found favour in the first instance, and the Lord Ordinary found the bills to be prescribed. The respondents brought this interlocutor under review of the Court, by a reclaiming petition, and it came to be a moot point, from what day the period of prescription was to be computed.

“ While the Court is a good deal puzzled with this question, another point is suggested by the respondents, and taken up by the Court, viz, that part of the sum due on the bills, having been paid

1796. in Fordyce's sequestration, the prescription was interrupted. But
 ————— clear I am, that the drawer of a bill is quite a different person from
 FERGUSON, & C. the acceptor, and must be sued separately, and the holder must
 " show that he has done diligence against both. What was done,
 DOUGLAS, therefore, against Fordyce the drawer, never could make the case
 HERON & CO. better for the respondents.

" The Court found that the bills were not prescribed, but the reason upon which their judgment was founded, was a bad one, namely, in respect of the claim entered in the sequestration of Mr. Fordyce's estate. The Court, however, afterwards corrected this interlocutor, and found that the prescription only run from the last day of grace; and in this part of their judgment I concur.

" Another point still arose in this cause, on the part of the present appellants. They said: " We prove the will in the Prerogative Court of Canterbury, therefore there can be no process against us " in Scotland."

" We are only liable to account in the Court where we proved the will, and where we found surety. This was not rightly alleged. There could be no suit against them in the Prerogative Court of Canterbury, but in a Court of Common Law. But, I must observe, that by the manner of their argument on this point, they allowed that they were liable to be sued as executors of Baron Grant.

Vide Ante. " There was again a moot point before the Court; Whether or not they had jurisdiction, as in this case, to call executors to account, where the will was proved in England? On the one side, it was contended, that it was a case already adjudged by the Court, and affirmed upon appeal, that an English administrator could not be called to account in Scotland; and for this a case, *Burrough v. Grant*, was cited. But, upon looking into this case, I find the inference made from it a mistaken one, and that it is inapplicable to the present question.

" On the other side, a case, *Morrison v. Ker*, was relied on, where the Court of Session held, that an English executor was liable to be sued for the estate and effects of the deceased in his hands in the Courts of law in Scotland. But that case also does not apply to the present question.

" But I have no doubt as to the competency of the Court of Session, in a case where either the persons of executors, or effects of the deceased, are within their jurisdiction. No matter where the will was made or proved, the Court has full jurisdiction, and could carry their judgment into effect. And this might even be where a will has reference to the law of England. It is in the power of the Courts of Scotland to procure information as to the rules of English law, in the same manner as the Courts of law here take cognizance of the laws of Scotland, and other foreign countries, and decide accordingly.

" The general question, in my opinion, and the justice of the case is, that the executors had nothing to do with Baron Grant, under

the will of Andrew. By that will Andrew makes over his estates in Granada to five trustees, one of whom does not act ; thereby a trust was created for payment of debts. The trustees were first to sell one plantation, and then to stop, if the creditors would consent, if not, they were empowered to proceed. It is only by force of this will that the demand of the respondents, in this case, could be made against the estate or executors of the deceased, as lands and real estate in Granada are not subject to be sold for simple contract debts. It is only in the execution of the trusts of that will, that the respondents could have access to recourse on the executors of Andrew Grant. I mean, always if it should be found that Andrew Grant is indebted to them.

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“ I do not wish to state my opinion, of what was or was not competent to the Court of Session, as to bringing parties before them ; but the question, Whether Andrew Grant was truly indebted to the estate of his brother the Baron, has not yet been stated to the Court. It is possible that Andrew Grant's estate may turn out subject to the payment of Baron Grant's debts.

“ The first thing to be done, is to show that he was really indebted to his brother ; and when this is done, the respondents will find that they are entitled to a benefit they were not aware of. By Andrew Grant's will, a trust was created for payment of debts, against which no prescription does run ; and his creditors will be entitled to receive payment out of this trust, of what shall be found to be truly due to them.

“ But the Court of Session, not well informed in these matters, directed payment to be made out of the trust of an individual debt ; but in this decision there was, in my opinion, neither reason nor justice ; it was precipitate. It might cause the trust funds to be all paid to one creditor. The cause being now remitted to the Lord Ordinary, he goes on to give decree against the executors ; and they having neglected to give in a specification of the trust funds in their hands, he also finds them liable in expenses, a thing unheard of before.* These decisions (judgments complained of), in my opinion, seem to be in every way inept.

“ It is not my wish to enter into any matter foreign to this cause, or which has not been agitated ; but my desire to see matters put upon a proper footing, induces me to point out the mode that may be adopted. Even though a judgment were recovered in the Court of Session, no effect could be attained by it, as the effects of the deceased are out of their jurisdiction. The proper court for the respondents to bring this matter to an issue in, is the Court of Chancery, and there, I myself know, that a suit is now depending, with regard to this very estate of Andrew Grant. If the respondents make their claims in this suit, they may be certain of receiving that mate-

* Here Mr. Robertson's light failed him, and he gives the rest from memory.

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“ I must, therefore, move your Lordships to reverse the whole interlocutors complained of by the appellants, except so much of one of them as finds that the prescription of the bills only runs from the last day of grace.”

It was ordered and adjudged that the several interlocutors complained of in the appeal be *reversed*, except as to so much of the interlocutor of 19th November 1793, as finds that the time requisite to completing the prescription in question, only began to run from the third or last day of grace; and therefore repels the plea of prescription, without prejudice to any claim which Douglas, Heron & Co. may make for payment of the two bills, out of the estate and effects of Baron Grant, or out of such part thereof, as have come to the hands of Andrew Grant, and for which he ought to have accounted in a suit for carrying into execution the trusts of the will of the said Andrew Grant.

For Appellants, *R. Dundas, Robt. Dallas.*

For Respondents, *W. Grant, John Anstruther.*

ALEXANDER MACDONALD, W.S.,	<i>Appellant;</i>
ROBERT BURT, Apothecary, Edinburgh,	<i>Respondent.</i>

Et e contra.

House of Lords, 29th November 1796.

DAMAGES.—MASTER AND ASSISTANT.—DISMISSAL.—Circumstances in which the Court of Session awarded damages to an apothecary's assistant, for an illegal and oppressive dismissal from service, by the son of his employer, without the employer's sanction and authority. Reversed in the House of Lords.

The appellant's mother had carried on the business of an apothecary, assisted by her youngest son, James, and the respondent, who was an assistant under her son James.

The respondent, Burt's mother, was also a niece of the appellant's mother, and, upon the death of James, the son, the whole management of the apothecary business devolved upon him. In consequence, however, of Mrs. Macdonald's executing settlements disinheriting the appellant and his children, and favouring Burt and his wife, the appellant resorted to certain harsh measures, upon which was founded the present action of damages.

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The summons set forth :—“ That, in the month of August 1781, the pursuer was solicited by his grand aunt to assist her son, James Macdonald, in carrying on the apothecary business, and, from the steadiness and attention he paid thereto, they found him of so great utility, that his living in the house was absolutely necessary. Accordingly, the pursuer agreed to live with them, as the infirmity and weak state of health of both Mrs. Macdonald and her son, required all the assistance in his power ; and, at length, as a mark of their favour and approbation, they entrusted him not only with the management of the business, but with the management of the house affairs, in which situation he continued till the month of January 1789, when Alexander Macdonald, Writer to the Signet, eldest son of the said Mrs. Macdonald, and a few of his friends, of their own accord, after the death of the said James Macdonald, illegally and unwarrantably entered the house of the said Mrs. Macdonald, and, among other acts of violence, he, the said Alexander Macdonald, turned the pursuer to the door, without concurrence and authority of Mrs. Macdonald, although he well knew that both she and her son James, during his life, always treated the pursuer with the greatest marks of esteem and approbation, and considered his services so essential, that they used every means to prevail upon him to reject a very profitable appointment abroad ; and notwithstanding Mrs. Macdonald had, after the death of her son James, expressed a wish that the pursuer should continue in her house, and conduct her business as formerly. That by this treatment of the said Alexander Macdonald, the pursuer has not only been thrown out of employment, but, from the circumstances of his former situation, has, in other respects, suffered considerable loss and damage.” He therefore concluded “ That the conduct of the said Alexander Macdonald towards him has been illegal and unwarrantable, and contrary to law and justice, and it being so found and declared, that he ought and

1796. " should be decerned and ordained, by decree of our said
 ——— " Lords, to pay £500 in name of damages, and as a *sola-*
 MACDONALD " *tium* for the injury done to him."
 v.
 BURT. A process of reduction was also raised by the respondent,
 to reduce a settlement executed by Mrs. Macdonald, at the
 last moments of her life, whereby she was made to revoke a
 previous settlement, leaving £100 of legacy, as well as
 the whole drugs, medicines, and shop utensils belonging to
 Feb. 3, 1792. her, &c., to the respondent. The reasons of reduction were
 —undue influence, force, and fear. In the latter action, the
 Nov. 28, — reasons of reduction were repelled, and the defender assoilzied.
 But the action of damages went on ; and a proof being
 allowed therein, the Lord Justice Clerk, before whom the
 July 16, 1789. case at first came as Ordinary, pronounced this interlocutor :
 " Having heard parties procurators fully, assoilzies the de-
 " fender, and decerns in the absolvitor." His Lordship
 stating at same time, that, as the respondent did not so
 much as pretend he had entered into any contract with Mrs.
 Macdonald, or with the appellant, it was impossible he
 could be entitled to any damages, even against her represen-
 tatives, for being so dismissed from the shop. On reclaiming
 petition, the Court remitted to Lord Dreghorn, Ordinary, *ob*
contingentiam of the reduction, to hear parties, and to dis-
 pose of the cause. Lord Dreghorn reported the case to
 July 8, 1790. the Court, who pronounced this interlocutor :—" Find the
 " pursuer entitled to damages, modify the same to £100,
 " and decern for payment thereof. Find the pursuer
 " also entitled to expenses." On petition a proof was
 Nov. 29, 1792. again allowed, upon advising which, the Court adhered
 Jan. 25, 1794. to the above interlocutors. On two further petitions, and
 Feb. 13, — answers, the Court adhered.
 Mar. 11, —

Against these interlocutors the present appeal was brought, and a cross appeal by the respondent, on the score of the damages awarded him being too little.

Pleaded for the Appellant.—The reduction of the settle-ments has been dismissed, and the latter settlement of the deceased confirmed, and consequently the idea once entertained by the Court, of giving the respon-dent damages equivalent to the legacy left him by the former wills, can no longer apply, and any claim of damages on account of the execution of the settlements, cannot be entertained. Even if such a claim lay on account of his services, yet that could never go further than £20 a year, for the last year he attended Mrs. Macdonald's shop,

and this claim could then only lie against Mrs. Macdonald's representatives; but the appellant does not represent her. In like manner, a claim of recompense for refusing to take the appointment at Algiers, would be ridiculous, even against Mrs. Macdonald's representatives. Besides, it is proved by the respondent's own declaration, that the impropriety of his conduct in keeping no books, and inverting securities, made his dismissal expedient and necessary. His dismissal was also justifiable from his keeping his mother locked up from her friends and relations, and debarring them access to her. On the cross appeal, the damages awarded are too much. In point of fact, no damages have been sustained, nor ought to have been awarded.

Pleaded for the Respondent.—It was a most injurious and oppressive piece of conduct in the appellant, to turn the respondent from the house and employment of Mrs. Macdonald, upon which he entirely depended for his immediate subsistence, as well as for his future prospects in life. That dismissal was aggravated by the disgraceful and violent manner in which the appellant executed his measures. It is also aggravated by his having done so without any authority from Mrs. Macdonald, from whom the whole affair was concealed, up till the day of her death. His groundless and calumnious assertions against his mother, Mrs. Burnet, also aggravate the case, and the injury he has received. He therefore, on cross appeal, maintained that recompense for a personal injury, especially where it is attended with high consequential damages, ought to be estimated as in the case of property being injured, where the actual loss can be exactly ascertained; but the estimate of that damage ought to be made upon a complex view of the person's situation who is injured, the manner in which the injury is committed, with all the consequences attending upon it, as well as the circumstances of the person who is liable to the reparation. In considering these circumstances separately, the damages awarded by the Court below, appear far from adequate, and several of the judges were of that opinion. If the Court had given £500, instead of £100, it would have only covered the direct damage and injury which the respondent has sustained by his conduct.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of in the original appeal be reversed, and the appel-

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lant assoilzied ; and it is further ordered, that the cross appeal be dismissed.

For Appellant, *Wm. Adam, Geo. Ferguson.*

For Respondent, *Thomas Erskine, John Dickson, James Montgomery.*

JOHN DENNY, Eldest Bailie of Dumbarton,
 JOHN KEAY, Dean of Guild, DAVID
 PHILIPS, JAMES ROCHHEAD, JOHN DIXON,
 WM. EWING, GEORGE, WILLIAM, and
 JOHN MACARTHUR, all Councillors of the
 Burgh of Dumbarton, - - - } *Appellants ;*

GEORGE, MARQUIS OF LORNE, Provost of
 Dumbarton, DAVID CONNELL, Second
 Bailie, ROBERT DAVIDSON, Treasurer,
 Captain ROBERT DAVIDSON, JAMES FER-
 RIER, ROBERT COLQUHOUN, and PETER
 HUTCHISON, all Councillors, - - - } *Respondents.*

House of Lords, 6th December 1796.

BURGH ELECTION—NOTICE—CUSTOM OF BURGH.—An ordinary meeting of council of the burgh of Dumbarton, taking place the day after the death of one of their number, the majority at this meeting, without any previous notice, proceeded to elect a new councillor in the room of the one deceased, though objected to by the minority. Held that this election was void, and that fourteen days' notice must be given to every councillor previous to such election, although it appeared from the records of the burgh, that it had been the practice for nearly a century, to proceed to the election without any such previous notice.

The Michaelmas election of magistrates of Dumbarton, for the year 1795, took place on 29th September, when the magistrates and councillors chosen, were the parties in this cause, with the exception of John Dixon.

Oct. 2. 1795. William Dixon was also one of the councillors then elected, but having died three days after the election, the present dispute regards the validity of the election of John

Dixon to fill up the vacancy in room of the deceased councillor. 1796.

Next day after the death of William Dixon, there was an ordinary meeting of council held, agreeably to the annual custom for qualifying the newly elected deacons of crafts and their masters, and also the guild, council, and other office-bearers. DENNY, &c.
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Upon that occasion eleven members of the council attended, and before engaging in the ordinary business of the meeting, the appellant, John Denny, the eldest bailie, moved, that as there was a vacancy in the council, occasioned by the death of William Dixon, the meeting should proceed to elect a councillor in his room. This motion was carried by a vote of seven of the members present, being a majority of the meeting, though David Connell, one of the bailies, objected to it, in which he was joined by Robert Davidson, Robert Colquhoun, and Peter Hutchison, all of whom are respondents in this cause, and who withdrew from the meeting. The meeting, however, proceeded after they withdrew, and after naming proxies, both for the four members who had withdrawn, and also for the other respondents, the Marquis of Lorne, Mr. Ferrier, and Captain Robert Davidson, they proceeded to the election of John Dixon as councillor, in room of William Dixon, deceased.

After the election was over, the four councillors who withdrew, returned with a notary and witnesses, and took protest against the said election, as null and void. That it had proceeded without due intimation being given to each councillor that such election was to take place. That the meeting was called for a different purpose, and for the ordinary business of the council, and for the purposes stated in the warning given them, without any information being given that an election of a councillor was to be proceeded with, and therefore protesting that their names should be erased from the minutes, as forming no part of the meeting.

The seceding portion of the council being joined by the other three respondents, on 8th Oct., by a mandate subscribed by them, determined to fix upon a day for the election of a new councillor in room of William Dixon, and appointed the 9th Oct. 9, 1795. day of October for a meeting of the whole councillors to proceed with said election. This meeting, and its purport and objects, were duly intimated to the whole councillors.

On the day previous to the 9th October, the appellants Oct. 8, —

1796. met, and took into their consideration the notice for the meeting of next day, and protested that such meeting was quite unnecessary, as the election of John Dixon in room of William Dixon, deceased, on the 3d October, was finally completed.
- DENNY, &c.**
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- Oct. 9, 1795. Next day, the respondents met, and fixed the 10th Oct.,
— 10, — the day following, to fill up the vacancy, which they did, by electing Alexander Connell a councillor of the burgh.
- Two elections having thus taken place, a reduction and declarator was brought by the respondents against the appellants, concluding to have the election of John Dixon set aside, and declared null and void, and to sustain the election of Alexander Connell, as the only legal and valid election.
- Jan. 13, 1796. The Lord Ordinary, of this date, pronounced this interlocutor: “ Sustains the reasons of reduction in so far as regards the election of John Dixon, but assoilzies from the declaratory conclusions with respect to the election of Alexander Connell; finds both elections null and void, and decerns.”
- Feb. 23, 1796. On representations by both parties, the Lord Ordinary adhered, “ and further finds, that no interim election of a new councillor in room of William Dixon can take place without at least fourteen days’ previous notice thereof being made to the resident councillors, of the day on which the said election is to take place.”
- Mar. 11, — On petition to the whole Court, the Lords adhered to the interlocutors of the Lord Ordinary.
- Against these interlocutors the present appeal was brought.
- Pleaded for the Appellants.*—The election of John Dixon on the 3d day of October, being made at a regular stated meeting of the council, at which every resident councillor was present, was valid; and the subsequent secession of four of the councillors present being illegal, they cannot found upon that secession as any objection, especially as the appellants, according to the practice of the burgh, elected proxies to vote at such election for them. There is, besides, no statute requiring previous intimation of any kind to be given of the intended election, much less that there should be a previous meeting called for fixing the day of the election; and there is no order or regulation of the convention of burghs of Scotland to the above purpose, and no uniform practice on the subject; and while the respondents have adduced no evidence of such practice,

the appellants have proved from the records of the burgh, that the uniform practice for nearly a century, has been to proceed with such elections without any previous notice whatever.

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Pleaded for the Respondents.—The election of John Dixon was void, as the same was proceeded with by fraud and surprise, and at a meeting not called for that purpose. That no more than seven members were present at the election, and it was unlawful in them to elect proxies for those objectors who had left the meeting in the face of a protest. That notice, from the nature of the thing, ought to be given for the election of a member of Town Council, in order that all electors who are qualified to vote, may have an opportunity of giving their voice at such election. That the interlocutors of the Lord Ordinary, unanimously confirmed by the Court, have declared that notice is necessary, and also prescribed what is reasonable notice. That where the set of the burgh, or long, constant, and uninterrupted usage, has not ascertained what notice shall be given, it is competent to the Court to determine what notice shall be given; and the Court has declared what it did by an act of Court, 21st January 1790, that sixteen days is a reasonable notice.

After hearing counsel,

LORD CHANCELLOR LOUGHBOROUGH said,

“My Lords,

“The present appeal respects the election of a member of the town council of the burgh of Dumbarton.

“By the constitution or set of that burgh, a certain number of members compose the town council, some of whom may be non-resident.

“The councillors of the burgh are elected annually on the 29th of September. After such election had been had on the 29th of September 1795, one of the councillors who had been then elected, dies on the 2d of October following. The practice of the burgh has been from ancient custom, that on the Saturday after the annual election, the councillors qualified themselves, by taking the oaths to the government, and other offices in the burgh are distributed.

“After the said election of councillors on the 29th of September 1795, notice was given of a meeting on Saturday the 3d of October, for the usual purposes. This meeting was accordingly held, and eleven members attended; some of them proposed to elect a new councillor in the room of the one who had died the day before; but four of the members present objected to this, thereupon left the

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meeting, and afterwards protested against such election. The other seven, however, proceeded against the minority of four.

“ The set of this burgh, allowing that proxies should be chosen for absent members, to vote in their names, the majority at the said meeting, appointed proxies for the members who had left the meeting, and then chose a member to fill up the vacancy in the council.

“ On the other hand, the opposite party, who were a minority of the council of the burgh, on the 8th of October called a meeting of the councillors, to elect a new councillor in the room of the one who was dead, and for this purpose they only gave two days’ previous notice. At the meeting so called by them only four members attended, and they proceeded to the election of a new councillor accordingly.

“ Each party having complained to the Court of Session of the election made by the other, their Lordships very properly held both elections to be bad. The Court says:—“ You may proceed to fill up the vacancy, and you must give fourteen days’ previous notice of the day of election ;” and, for a general notice, these fourteen days seem a reasonable period.

“ A number of cases was cited by the appellants in the Court to show that election of officers of the burgh had taken place at meetings of the councillors without previous notice. But the nature of the thing renders intimation absolutely necessary; and no practice, however inaccurate, or for whatever length of time, can establish a contrary rule.

“ It is true, that if the councillors assembled in general meetings are unanimous in concurring upon any measure competent to such general meetings, and if all the members acquiesce, it may be in their power to proceed to matters, of which no previous intimation was given. But if the members are not unanimous, it will be necessary for a new meeting to be called, with proper intimation of the measure intended.

“ The election which the appellants attempt to support in this case, is of a very extraordinary nature, and appears to me in every view to be surreptitious and fraudulent. It was an attempt to choose a new councillor in place of one who had been dead but a few hours before, and whose death was not known, perhaps, till the meeting in question was actually held.

“ I therefore move, that the appellants do pay to the respondents £100 for their costs in this cause.”

It was ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed. And it is further ordered, that the appellants do pay, or cause to be paid, to the said respondents, £100 for their costs in respect of the said appeal.

For Appellants, *J. Anstruther, C. Hope, W. Dundas.*
For Respondents, *R. Dundas, J. Campbell.*

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JOHN PRINGLE, at St. Clement's Wells, *Appellant;*
 JANET DOVE and JANE DOVE, Executrixes }
 and Residuary Legatees of ELIZABETH } *Respondents.*
 Tod, deceased,

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House of Lords, 17th Dec. 1796.

REDUCTION OF DEED—MENTAL INCAPACITY.—Circumstances in which a will, conveying her whole moveable estate to a stranger, executed by a party impaired in memory and judgment, eighteen days before her death, was sustained by the Court of Session; but reversed in the House of Lords, and will set aside and reduced.

THIS was a reduction raised by the appellant, to set aside and reduce a deed of settlement executed by his aunt, the deceased Mrs. White, in favour of Miss Elizabeth Tod, on the following grounds:—1. That the said Margaret Pringle, or White, at the time the deed was executed, was so much impaired in her mental faculties that she was incapable to give directions for making out a settlement, far less to understand any settlement that was presented to her to be signed; and, 2d, That it was perfectly plain, that for sometime previous to the 13th day of July 1787, the date of the deed, and during the period she lived thereafter, that she was not of a sound and disposing mind, and in a situation to execute a valid settlement, or to transact any business whatever. Conclusions of count and reckoning were also joined to the summons. He also stated in a condescendence, and offered to prove, That “about the
 “end of May, previous to her death, she became so im-
 “paired in her mental faculties, as to be perfectly incapable
 “of managing or giving directions about her own affairs.
 “That about that time she was carried from her own house
 “in the Castlehill, to the house of John Aitken in Brunt-
 “field Links, where she resided a short time; and from
 “thence she was carried to the house of Miss Tod at Laurie-
 “ston, where the settlement under challenge was executed,
 “and where she died” eighteen days thereafter. The appellant also craved the Court to ordain Miss Tod to appear before the Court, to answer such questions as should be put to her respecting the incapacity of Mrs. White, which might render proof by witnesses unnecessary. The Lord Ordinary, on answers from the respondent, disallowed the examination of Miss Tod, and allows to both parties a proof of their averments, reserving to the pursuer,

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appellant, to put all competent questions to Miss Tod, in order that she may answer to the same, in writing under her own hand. This last course was adopted. Answers to the appellant's interrogatories being put in by Miss Tod in writing under her own hand.

A proof was also taken. Janet Allan, a witness, deponed, that she knew the deceased from childhood up till the time of her death. When she went to Bruntsfield Links she appeared to be declining, and in a dying situation: "That
" the last time deponent saw deceased in her own house, was
" on 15th May 1787, and *at this time* the deponent observed,
" in the course of conversation, as well as in many other
" conversations, she talked incoherently, and did not seem
" to understand what she was saying, and was so much
" failed in mind that she repeatedly asked the deponent how
" she did." Further, "That Mrs. White appeared to the
" deponent to be incapable, from the state of her mind, to
" transact any of her own affairs, such as making bargains
" with her tenants, and other matters which she had been
" in the practice of doing." Rachel Profit deponed, that
at the time above specified "her judgment and memory
" seemed so far to have left her, that she was incoherent in
" what she said upon every subject whatever: That the
" servant came one morning telling the deponent to go to
" her mistress' house immediately, saying, that her mistress
" had gone perfectly mad. This was about a fortnight or
" three weeks before she left the Castlehill. Deponent went
" and found her in a very disagreeable situation from dis-
" tress of body and mind: That she had seen her two or
" three times after she was carried to Miss Tod's house. She
" appeared to the deponent to be much worse, and her
" judgment had perfectly left her." Alexander Cameron,
another witness, deponed, "That at this time she was wa-
" vering and unsettled in her mind; but whether this pro-
" ceeded from disease or vapours in her head, deponent
" cannot say." Her own servant, who waited upon her,
deponed, "That while in Miss Tod's house, she often be-
" lieved she was at home: and when she wanted anything
" she would desire her to go to places where such things
" had been kept in her own house, apparently forgetting
" that the furniture in her own house had been sometime
" previously roused and sold. These slips of memory often
" occurred. The deponent never saw any one come to do
" business with her at this time, except two gentlemen to

“ sign a paper, which the deponent understood was a settlement of her affairs, and that this happened after Mrs. White was confined to bed.” There was also the evidence of the writer of the deed, who declared, “ that he was Miss Tod’s usual man of business: That he had never been employed by Mrs. White, and that Miss Tod in this case had sent for him to speak to her about the making of the settlement: That the deponent advised Miss Tod to have nothing to do with the heritage, but that he would make out an assignation to her moveables in her favour, and that he accordingly did so.”

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In the answers given to the interrogatories put in by the appellant, Miss Tod declared, That while Mrs. White was in her house, she did not say any thing in her hearing that betokened either an absence of memory or unsoundness of judgment, and that Mr. Livingstone, the writer who executed the deed, stated, that he sent his clerk to have the deed executed, and that Miss Tod told him nothing about Mrs. White’s state of health, except that she was *very ill*.

Mr. Bisset (Mr. Livingstone’s clerk), on the other hand, deponed, That when he went to execute the will, he found Mrs. White sitting up in bed, and that when he entered, she stated she was glad to see them. “ He handed her the deed, and she then desired him to read it. He read it, and asked her if that was her will? To which she answered, Yes. Upon this she signed it. During the whole of this time she appeared to be perfectly sensible, and of knowing the nature and effect of the deed.” Other witnesses were adduced to prove that she was quite capable to execute such a will. The signature of the deceased to the deed did not present her ordinary subscription. The *surname* was wholly unintelligible, and could not possibly be deciphered.

The Lord Ordinary reported the cause, with the proof and informations, to the Court. The Court, after hearing parties in debate, “ repelled the reasons of reduction, and May 16, 1793. “ assoilzied the defender from the process, and decern.” On petition, the Court adhered, there being five judges for adhering, and the Lord President Campbell and three other judges against the judgment. July 3, —

In these circumstances the present appeal was brought.

Pleaded for the Appellant.—It is clearly established by the evidence, that at the time of making the will or settlement in question, as well as for several weeks before that period, and afterwards till her death, Mrs. White,

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the testatrix, was not of a sound or a disposing mind; but that the powers and faculties of her mind, judgment, and memory, which had been progressively failing during the course of the winter and spring preceding her death, were become so greatly impaired, as to render her totally incapable of managing her own affairs, and utterly unfit her for any exercise of reason. Besides, the conduct of Miss Tod in carrying her to her own house, and excluding access to her on the part of her friends and relations; in calling in no medical aid or assistance, and in procuring the will to be executed in the manner she did, was sufficient to set aside the deed. 2d. The deed, as signed by the deceased, cannot be sustained. The surname adhibited is totally unintelligible, and cannot be considered more than as a mere mark adhibited by the deceased, which mark cannot in the law of Scotland be admitted as a valid subscription to deeds of importance, i. e. deeds in relation to property above the value of £100 Scots. In this case, the rule laid down in the case of Crawford of Doonside, (App. to Mor. Dict.), must apply, that no deeds of such a nature, signed by a mark or by initials, can be sustained.

Pleaded by the Respondents.—The appellant has not proved that the deceased was deranged in her mental faculties at the time she executed the will in question. The evidence only amounts to this, that at times she was wavering and incoherent in conversation, a failing incident to all in old age, and while under a weakly state of body. While the evidence, on the other hand, is clear that the deceased gave instructions for making her will as it stands, a considerable time before it was executed, and that she appeared to the gentlemen who took those instructions to be perfectly sensible; and not only was the will read over to her at the time she signed it in presence of the attesting witnesses, but, in discourse with them at the moment, she showed her perfect understanding of its import and effect.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be reversed. And it is further ordered, that the reasons of reduction be sustained; and that the cause be remitted back to the Court of Session in Scotland to proceed accordingly.

For Appellant, *Sir John Scott, W. Adam, H. Erskine.*
 For Respondents, *W. Grant, J. Anstruther.*

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[M. 10101.]

MACKENZIE,
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MACKENZIE and LINDSAY, . . . Appellants ;
CLAUDE SCOTT, Corn-Factor, London, . Respondent.

House of Lords, 19th Dec. 1796.

DEL CREDERE COMMISSION.—Held that such a guarantee not [only covers the sales of goods effected, but also warrants the remittances made as the proceeds of those sales.

The appellants, merchants in Dundee, had purchased corn on the respondent's account, intended for foreign export, but the government having prohibited the exportation of grain at the time, he ordered Mackenzie & Lindsay to sell it for him. This was done accordingly ; and Mr. Scott having written for a remittance on account of sales, the appellants, of this date, wrote, enclosing a remittance by draft Mar. 20, 1793. or bill, in the following terms:—" We are happy to wait upon you with the enclosed draft of Messrs. Bertram, Gardner, & Co. upon Baillie, Pocock, & Co., of this date, at seventy-five days, for £1000, to account of your wheat re-sold by us, which please pass to our credit. The wheat is sold at three months credit ; but as we wish you reimbursed of your outlay of money, *we have taken that upon ourselves, which must be more agreeable to you.*"

[Bill or draft.]

" *Edinburgh, 20th March, 1793.—£1000.*

" Seventy-five days after date, pay this, our first of exchange, to the order of Messrs. Mackenzie & Lindsay, One Thousand Pounds, sterling value, on account, which place to account, with or without advice, from

" BERTRAM, GARDNER, & Co.

" *To Messrs. BAILLIE, POCKOCK & Co., London.*

" Indorsed—Pay to Claude Scott, Esq., or order.

" MACKENZIE & LINDSAY."

The bill was duly accepted, but before it fell due, both acceptors and drawers had failed ; and the question was, who was liable to bear the loss, whether M'Kenzie & Lindsay, the remitters, or Mr. Scott, to whom it had been indorsed in payment of the corn. The latter had not desired, and did not expect the remittance in this form, but did not ob-

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ject to it when sent in this shape. Previous thereto, and on the resale of the wheat, M'Kenzie & Lindsay had sent him an account of the sales, in which it appeared, after deducting $2\frac{1}{2}$ per cent. for trouble on the sale, and $1\frac{1}{2}$ per cent. of *del credere* commission, there was a balance on hand of £1441. 12s. 11d. Before raising legal proceedings, a correspondence took place, in which the appellants held themselves out as liable for the £1000 bill; but after taking legal advice, they changed their view, and denied liability.

On the respondent then proceeding to charge on the bill, a bill of suspension was offered, the appellants contending that a *del credere* commission, which they admitted to have charged and received, did not import any other guarantee or obligation on them than the solvency of the purchasers of the grain sold, and that this guarantee did not cover or extend to the remittance of money by them to their employer, and that the circumstance of taking a bill *for remittance* by Messrs Bertram, Gardner & Co., payable to themselves, and indorsing that bill to the respondent, did not subject them to any obligation to which they would not otherwise, or independent of any such obligation, be liable; and that the letters written by them were written under a misapprehension of a *del credere* commission, and of their liability, and cannot foreclose them from contending that the *del credere* does not cover the remittances. And when remittances made by good bills are sent and accepted of in payment of the wheat, their liability under the *del credere* commission expired. In answer, the respondent contended that a factor, under a *del credere* commission, is absolutely bound, in all events, to make good the sales effected by him. That, in this respect, he is as absolutely bound as if he himself were the purchaser. And, on the only point on which the appellants' case rests, the opinions of merchants produced are against them. Messrs Booth & Co., merchants in Liverpool:—"We have always considered ourselves responsible for the bills we remit, when we charge a *del credere* commission; and when it has happened that any such bills have been returned for non-payment, we have, ever since we have been in business, immediately replaced them."

Messrs. Corrie, Gladstones, and Bradshaw, an eminent company in Liverpool:—"Whatever bills we remit on account of the proceeds of grain or flour consigned to us for sale, we guarantee the payment of, as we always charge the

del credere commission, and such we believe to be the general practice here, at least we never knew of any instance to the contrary anywhere."

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The Lord Ordinary (Lord Justice Clerk) repelled the reasons of suspension, and on representation adhered. And on a reclaiming petition to the whole Court, the Lords adhered.

Feb. 21, 1794.

Jan. 14, 1795.

— 15, —

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The *del credere* commission only guaranteed the sale of the wheat, but the *remittance* of money being a transaction totally different and distinct, was not covered by such guarantee. His obligation ends by remitting bills of a house in good credit at the time; and if these are accepted of in payment, a new and distinct transaction takes place, by which the factors are no longer liable under their *del credere* commission. Nor can the indorsement of the bill by them, nor the correspondence founded on, make them so liable, if the *del credere* does not otherwise make them responsible.

Pleaded for the Respondent.—A factor holding a *del credere* commission for the sale of goods, is absolutely liable for payment of the price of sales effected by him, and such being the nature and extent of the guarantee undertaken by the appellants in this case, they are liable for remittances by bills instead of cash, for the wheat sold by them. At all events, the appellants, by indorsing the bill remitted to the respondents, did *eo ipso* subject themselves in payment; and the whole circumstances of the case corroborate the obligation on them as the indorsers of this bill. Besides, the appellants, by their letters, held themselves out as liable, and obtained repeated delays for the payment, and have been guilty of a gross breach of faith, in obtaining that delay on their assurance "that no event whatever would prevent their discharging this debt."

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, Sir J. Scott, R. Dundas.

For Respondent, Wm. Adam, John Bayley.

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EARL OF DUNDONALD v. BUSHBY, &C.	ARCHIBALD, EARL OF DUNDONALD, JOHN BUSHBY and JOHN LOUDON MACADAM, Esqs., Trustees of the late Hon. Admiral Keith, and ROBERT WATSON, Writer in Edinburgh, Common Agent in the Pro- cess of Ranking and Sale of the Estates of the said Earl of Dundonald,	- <i>Appellant ;</i> } <i>Respondents.</i> }
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House of Lords, 27th December 1796.

RANKING AND SALE—VALUATION OF THE ESTATE.—Circumstances in which the mode adopted in valuing the estates in the ranking and sale, for the purpose of fixing the upset prices at which the same was to be set up for sale, was unexceptionable, and objections repelled.

A ranking and sale having been brought of the appellant's estate of Culross by his creditors, the common agent, in conducting the business for the general behoof of the creditors, proceeded in the usual manner to take a judicial valuation of the estate, for the purpose of fixing the upset price for which it was to be exposed by judicial auction.

Valuators were accordingly appointed, who proceeded to value,—1st. The wood or forest of Culross ; 2d. The ground or land occupied by the forest ; and 3d. The mansion house or abbey of Culross.

1. In regard to the first, the valuers valued a certain part of the forest at 4d. per cubic foot, and another part at 4d. per running foot, and the whole at £30 per acre.

2. In regard to the ground occupied by the forest of Culross, they valued the 729½ on an average at £15 per acre.

3d. In regard to Culross Abbey, the valuers took the aid of an architect. Having measured the new and the old parts of the abbey over walls, they found it to contain 245,000 cubic feet ; and valued the new part at 5d per foot, and the old part at 3d. per cubic foot.

It was stated by the appellant, in objecting to this valuation, that the whole had been valued a few years before (in 1780) by Sir Ralph Abercromby, George Abercromby, and John Clerk, Esq. of Eldin, at a very different value, these gentlemen having valued the wood and forest at £41 per acre, and offered to prove that the proper price of wood was 8d per foot.

The appellant's objections were, 1st, to the forest and

forest lands as too low ; and, 2d, to the Abbey of Culross as too high priced.

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In these circumstances, the appellant petitioned the Court to see the plans and abstract of the proof, and to lodge objections. He got till the next sederunt day in next November, to lodge objections ; and this time was further prolonged till 6th July thereafter, but no objections having been lodged, in consequence, as the appellant stated, of being obliged to leave Scotland on affairs of national importance, the Court, of this date, pronounced this interlocutor: “ Upon the report of Lord Meadowbank, and having “ advised the state of the process, testimonies of witnesses, “ writs produced, scheme of probation, and memorial and “ abstract given in, in terms of the act of sederunt, the “ Lords find it proven, that the total gross value of the “ forest and forest lands of Culross, part of the subject of “ the second lot, extends to £16,610. 14s. sterling. “ Find it instructed by a certificate of David Ireland “ produced, that the ground occupied by this plantation, “ is holden feu of the burgh of Culross, for payment of a “ yearly feu-duty of £13. 8s. 8d., which the Lords value at “ twenty years’ purchase, and which extends to £268. 13s. 4d., “ and that, after deduction of that sum, there remains as the “ net value of the forest, the sum of £16,342. 0s. 8d. “ Find it proven that the total value of the wood and wood- “ lands in neighbourhood of Culross Abbey, extends to “ £1389. 11s. 8d., and that the total value of the subjects “ contained in the second lot, amounts to £17,731. 12s. 4d., “ Find it proven that no deduction appears to affect the “ subject of the third lot, being the Abbey of Culross, and “ which the Lords value at £5466. 13s. 4d. sterling. More- “ over, the Lords, from the evidence produced, value the “ tenth lot, being the aisle in the church and tomb, or “ burial place of the family, at £1200. Therefore the “ Lords ordain the foresaid subjects to be exposed to sale “ by way of public roup, within the Parliament House, on “ the 1st day of December next, between the hours of four “ and six o’clock, and remit to the Lord Ordinary on the “ bills for the week, to be judge of the said roup, with power “ to adjourn the same as they shall see cause, and to ad- “ just the articles and conditions of roup, and to sell the “ said subjects jointly at the aforesaid price of £39,528, 16s., “ or separately, at the foresaid valuations put thereon by “ the Lords, or at higher prices, if the same can be had

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“therefor, but not under the above price or prices. And, “to the effect that all concerned may be duly certified of “the said roup, ordain letters of publication and intimation thereof, to be expedite.” At the same time, the Court refused the desire of the appellant’s petition for delay to give in objections to the valuation.

Against these interlocutors the present appeal was brought, craving a reversal, and a remit to the Court of Session, to allow the appellant to give in his objections to the valuations, and to allow him a proof of the true worth and value of the subjects.

Pleaded for the Appellant.—The great difference between the value in 1780 and the judicial valuation, ought to have induced the Court to give time to the appellant to prepare his objections, and to lead proof as to the proper valuation. 2d. Besides, the value put upon the Abbey or mansion house, is most extravagant, and the mode of computing the value improper and unusual. Whether it is meant to sell it along with the estate, or separately, the appellant does not know, but, in either case, the high valuation is injudicious. If sold with the estate, it will be a clog when so valued. If put up to sale separately, who will purchase a large house without land annexed, without even a garden? 3d. To the sale of the burial place of his family, the appellant cannot object, if his creditors insist upon it; but he does object to the way in which the tomb of his forefathers has been valued, and by the interlocutor is ordered to be put up to sale, as the tomb is evidently devoted to destruction, and in the appellant’s humble apprehension, a sort of authority is given for the commission of sacrilege.

Pleaded for the Respondents.—This process of ranking and sale has been carried on and proceeded in with an exact conformity to the act of sederunt, and the present appeal is solely got up for the purpose of retarding the sale of the appellant’s estates, and delaying that justice he owes to his creditors, of receiving payment of their just debts. 2. Besides, every indulgence in the way of delay has been conceded to the appellant, for the purpose of correcting any mistakes in the valuation. It would therefore be adverse to the interests of the creditors to delay the sale longer, which has depended for so many years before the Court, and even prejudicial to the appellant himself. 3d. The respondents have taken the most proper measures for ascertaining and adjudging the true value of the debtor’s estate; and if he was

dissatisfied with the evidence brought forward of the value, it was incumbent upon him to bring contrary evidence, if it was in his power:

After hearing counsel, it was

Ordered and adjudged, that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

And it is further ordered the appellant do pay to the respondents £50 for their costs in respect of said appeal.

For Appellant, *Sir J. Scott, W. Grant, J. Anstruther.*
W. Adam.

For Respondents, *David Williamson, Wm. Dundas.*

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WILLIAM FERGUSON of Raith, Esq. - *Appellant ;*
HUGH MOSSMAN, Esq., and J. ANDERSON, } *Respondents.*
W.S. - - - - -

House of Lords, 17th Feb. 1797.

JUDICIAL SALE—ERROR—MISREPRESENTATION—ADVERTISEMENT OF SALE.—The teinds were represented in the memorial and abstract of a ranking and sale, and in the advertisements of the sale of the estate, to be valued and to be exhausted, and subject to no further burden from stipend. Held, on discovery of an informality fatal to the sub-valuation, and which deprived the lands of exemption from such burdens, namely, that the sub-valuation and report of the sub-commissioners had not been approved of by the high commission of teinds;—that the purchaser was not entitled to abatement from the price, there being no *mala fides* on the part of the seller.

The appellant was purchaser of the lands of the Macfarlane estate, at a judicial sale, including the lands of Upper and Nether Arrochar, in the parish of Arrochar. The upset price was £19,756. They were knocked down to him at £28,000, and were bought under the representation that the teinds were valued, and the value of them exhausted by the stipend of the minister; and this was set forth in the advertisements of the sale, and was proved by the sub-valuation of

1797. — the commissioners, in August 1629 ; and by a decree of the Court of Session in July 1784, which had refused an application by the minister for an augmentation of stipend, on the ground that it was proven that “ there is payable yearly of stipend to the minister of Arrochar, £28. 17s. 9⁶/₁₁d.,” and “ that the teinds of the said lands are exhausted.” It turned out, however, that there was a mistake, namely, the sub-valuations or reports of the sub-commissioners were not legally approved of by the high commission of teinds by a proper decree of approbation, and the sub-valuations were liable to other intrinsic objections. Hence the appellant insisted in the present action, for an abatement from the price on this account,

Jan. 23. 1796. yet the Lord Ordinary found : “ That it must be presumed “ that Mr. Ferguson, prior to his purchase of the estate of “ Arrochar, made inquiry, not only into the circumstances “ and situation of that estate, but also into the rights and “ titles thereof; and as he had obtained all right, title, and “ interest, which Messrs. Macfarlanes and their creditors “ had in the estate, (which was all they were bound to do “ by the conditions of sale), therefore finds Mr. Ferguson is “ not entitled to any deduction from the retained price on “ account of the teinds in question, and dismisses his claim

Feb. 3 and 17, 1796. “ accordingly.” And on two representations, the Lord Ordinary adhered, and on reclaiming petition, the Court

June 1, — adhered.*

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—In determining the question here raised, no difference can be made in point of principle between a judicial sale by creditors on a bankrupt estate, and a sale voluntarily made by the proprietor himself. The rules which apply in the latter case must, with equal force, bind and take effect in the former; and, assuming no distinction to exist between judicial and voluntary sales, at least in the completion of the sale, it is a fixed rule, recognized in the law of Scotland, that the purchaser is entitled to relief against the seller where he has been induced to the

* LORD PRESIDENT CAMPBELL said :—“ I think the interlocutors right. The whole facts were fairly stated, and offerers might judge for themselves. What if the teinds had been stated as not valued, and afterwards a valuation was discovered ?”

purchase either by fraud, by misrepresentation, or by error. In the present case, by misrepresentation and by error, the appellant was induced to purchase an estate, a part of which has been evicted as not belonging to the seller, although such was represented to belong to him, and a price paid, upon the distinct understanding that it formed a part of the subject sold, and warranted as such by the seller. In such a case, the Court has always given relief. Vide *Mrs. Blair v. Murray*, 16th June 1790; *Loyds v. Creditors of Paterson*, 13th Feb. 1782, F. C.; *M'Lean v. M'Neill*, 23d June 1753, M. 14164. Such representation appeared in the whole proceedings of the judicial sale. In the memorial and abstract stating the rent, burdens, value of the estate, &c., and likewise in the advertisements, and the assertions of the agent on the sale, it was expressly set forth that the teinds were valued and exhausted, and that no further burden could in that shape be brought upon the property; and it would be an extraordinary proposition indeed, to say that the appellant was not bound to rely on all these representations, just as it would be equally unjust to hold that when all these representations turned out erroneous, there was to be no remedy; a result that would be neither consonant with law nor justice. Even in the most favourable view of the case for the creditors, there has been an error common to both parties, in which case, every principle declares that the sellers ought not to receive a price for a subject they had not to give. There is thus an error in the first essential of a sale, namely, the subject. And at the very least, in terms of the decisions, in such cases an abatement ought to be allowed.

Pleaded for the Respondents.—The appellant does not allege that the teinds of the lands of Upper Arrochar were comprehended in the sale. All he says is, that it was held out to purchasers that the lands could not be subjected to a further payment as for teinds, because the minister's stipend exhausted the valued teind, which he says implied a warranty of exemption. But it by no means follows that he was bound to rely on the memorial and abstracts and advertisements. The former are merely framed for the information of the judges, and the latter always refers to the evidence lying in Court, for any fact which may be therein stated. With the evidence of these facts, a purchaser at a judicial sale must be presumed satisfied. And these representations were mere matter of opinion, formed and given from documents pointed out. No disguise or fraud was practised, and as it was admitted that the appellant's man

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1797. of business examined those writings, and in particular the subvaluation in 1629, he and they are to blame if they did not discover the informality which afterwards proved fatal. Vide *Earl of Morton v. Creditors of Cunningham*, 14th Nov. 1738, M. 14175; *Dempster v. Creditors of Skibo*, 27th June 1788, M. 13335; *Hannay v. Creditors of Bargaly*, 26th Jan. 1785, M. 13334.

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After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Sir J. Scott, Wm. Adam.*

For Respondents, *W. Grant, J. Anstruther.*

NOTE.—Unreported in Court of Session.

[M. 15768.]

WM. FERGUSON of Raith, - - - *Appellant ;*
Rev. JOHN GILLESPIE, Minister of Arrochar, *Respondent.*

Et e contra.

House of Lords, 17th February 1797.

APPROBATION OF OLD SUB-VALUATION OF TEINDS—DERELICTION—
AUGMENTATION OF STIPEND—EXHAUSTED TEINDS.—A report of the sub-commissioners as to the valuation of the teind, was not approved of, nor had the sub-commissioners, on valuing the teinds, taken any proof of the value of the lands. (1.) Held, in action of approbation brought to have these old valuations approved of at the distance of 160 years, that approbation fell to be pronounced as to the lands of Nether Arrochar; but (2.) as to Upper Arrochar, it being objected that the minister was neither present, nor cited to appear before the sub-commissioners in the valuation, and the record did not bear either that he was present, or cited to appear; Held this a good objection to the approbation as regards those lands; and therefore, that there was no bar to the minister's augmentation. (3.) Also held, that it is not a dereliction of a former valuation, where the stipend is payable part in money and part in grain, that the whole has been paid in money for more than forty years.

The informality in the sub-valuations of the lands of Upper and Nether Arrochar, purchased by the appellant, having been discovered, as stated in the preceding case, this induced the minister of the parish to bring a process of augmentation before the Court of Session, as Lords Commissioners for the Plantation of Kirks and Valuation of Teinds,

setting forth, that as his stipend was greatly under the minimum of £43. 3s. 10 $\frac{1}{2}$ d., which was totally inadequate to the extent of the parish, and burden of the cure; and as the rental of the whole lands (nine-tenths of which belonged to the appellant), amounted to £1000 per annum, one-fifth of which by law was the teind of the parish, there was sufficient fund for an augmentation of the minister's stipend. In defence, the appellant pleaded, that, the lands ought not to be fixed at a fifth part of the present rent, because the amount of these teinds had been fixed by two old sub-valuations, pronounced in the year 1629, from which it appeared they were valued at no more than 412 merks Scots, (£22. 7s. 9 $\frac{1}{2}$ d.) and twelve bolls of meal, (equal to £6. 10s.) and therefore, that the stipend already paid the minister, more than exhausted the whole teind, and consequently there was no room for augmentation. The sub-valuations had been approved of by the High Commission of teinds, by a decree of approbation in 1769, but erroneously, as they proceeded upon the footing that the 400 merks in the report as to Upper Arrochar, was for both stock and teind, whereas it was for teind only; and the decree, therefore, laboured under a radical defect. It being necessary to complete the sub-valuations by a decree of approbation, the appellant in consequence was obliged to bring also a process of approbation. There was also a deletion in one of these reports of the sub-valuations, the following words being deleted,—“ of the teinds;” and the summons set forth, that the words “ of the teinds,” in the second of these reports, having reference to the lands of Upper Arrochar, having been improperly deleted, ought to stand as part of the valuation, and both reports approved of. The respondent being called as a defender, appeared, and besides disputing that the words “ of the teinds” should stand a part of this sub-valuation, he pleaded in defence, that the appellant was not now entitled to obtain decree of approbation, because the benefit of such sub-valuation was lost by dereliction, as the stipend which had been paid to the minister of the parish, beyond the years of the long prescription, exceeded the amount of teind ascertained and fixed by these sub-valuations by the sum of £3. 10s. 1 $\frac{1}{4}$ d. (According to the appellant of £1. 16s. 9d.). The minister's process of augmentation was sisted until the issue of the process of approbation, as it depended upon it, whether there were any teinds out of which an augmentation could

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be modified ; and on this the Lord Ordinary ordered memorials, and when these were reported to the Court, the Lords were satisfied that the objection stated to the sub-valuation, in consequence of the words “ of the teind ” being deleted, was irrelevant, and the objection on the ground of dereliction not good, but, in consequence of two other objections being suggested, 1st. That the amount of the teinds had been ascertained in these old valuations without any proof ; and, 2d. That in so far as regards the lands of Upper Arrochar, to which the second sub-valuation relates, the minister of the parish neither was present nor cited as a party. Upon these points, the Lords, before answer, ordered additional memorials, after considering which, their Lordships pronounced this interlocutor :—“ The Lords having advised
Jan. 22, 1794. “ the libel of approbation, with the report of the sub-commissioners of the presbytery of Dumbarton libelled on, “ memorials, and additional memorials for both parties, “ they ratify, allow, and approve the said report, in so far “ as regards the pursuer’s lands of *Nether Arrochar*, and “ interpone their decretet and authority thereto, and decern “ conform to the conclusions of the libel in so far as concerns these lands ; Refuse to approve the said report in so far as regards the pursuer’s lands of Upper Arrochar : Assoilzie the defender from that conclusion of the libel, “ and decern.”

The teinds of Nether Arrochar, . . .	£6 13 4
Teinds of Upper Arrochar, . . .	22 6 5 $\frac{1}{2}$

According to the sub-valuation, . . . £28 17 9 $\frac{1}{2}$

But the minister had always been paid £30. 11s. 2 $\frac{5}{8}$ d.

As the above decision, in regard to the teinds of Upper Arrochar, left a sufficient fund for the minister’s augmentation, taking a fifth of the present rental of those lands, independently altogether of the teinds of Nether Arrochar, the respondent did not seek to disturb the judgment on this last point, seeing that the decision made the lands liable to further burden of augmentation of stipend. But a reclaiming petition was presented by the appellant, wherein he contended, in answer to the objection, as concerns the sub-valuation of Upper Arrochar, regarding the minister not being present, nor cited to appear ; that His Majesty, the arbitrator to whom had been submitted the settlement of teinds, had, by his letter to the sub-commissioners, directed that where there had been an old rental, and the

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teinds had been paid conform thereto, these “ old rentals “ should stand for a valuation where the parties consent, or “ do not oppose it ;” and, consequently, it was not incumbent on him to show, nor necessary for the record of the sub-valuation to set forth, that the minister was present, in order to found a conclusion that he did not object, as in this public act he must be presumed to know; and the natural inference from his not being present was, that he had no ground to oppose the valuation. And though the report of the sub-valuation did not mention that the minister was present, it did not therefore follow that he was not lawfully cited to appear. The legal presumption rather was, *omnia rite et solemniter acta*, especially as to him, who was an essential party to be called; and, at the distance of 160 years, it was reasonable to presume that he was so called, in order to make the proceedings effectual against him.

Besides, there was *prima facie* evidence that the minister knew well of the proceedings and diets as to Upper Arrochar, because it appears from the report, in regard to the Nether Arrochar teinds, which was going on at the same time with Upper Arrochar, that the minister was present at various parts of the proceedings. He could not attend the one without being apprised of the diets in regard to the other. If he attended to the one, in which his interest was infinitely of lesser magnitude, the presumption is, that he was present and attended to the other. The respondent answered: That it was true, that his Majesty had ordered that the old rentals should stand as the valuation, where the parties consent, or do not oppose; but this only applied where parties having interest either appear, or are lawfully cited to appear; but here the minister did not appear, nor was cited to appear, of which the record itself bore evidence, because the report of the sub-valuators does not mention either the one or the other. He cannot therefore be held as not opposing what he was entirely ignorant of: Had he been cited to appear, or had he appeared, the argument deduced from his not opposing the valuation would have had considerable force; but when, *ex facie* of the record, the minister was neither present nor cited, no such conclusion or consequence can follow. Nor is the reasoning in regard to the sub-valuation of the lands of Nether Arrochar, which took place at the same time, and at some of which he was present, more conclusive, because the proceedings in these two cases were totally different. The properties at that time,

1797. belonged to different parties, which necessitated in each a separate procedure. The Court, of this date, adhered.
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 FERGUSON Thereafter the process of augmentation was resumed, and
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 GILLESPIE. the minister was allocated a stipend of twelve bolls of meal,
 Feb. 4, 1795. and £1000 Scots (i. e.) £83. 6s. 8d.), with £5 for communion elements.

An appeal was then brought to the House of Lords against the above interlocutors, in so far as concerns the lands of Upper Arrochar, and a cross appeal by the respondent in regard to Nether Arrochar.

Pleaded for the Appellant.—The appellant's predecessor in those lands, obtained, so long back as 160 years ago, according to the usual forms and act of Parliament observed in such cases, a valuation of his lands by the sub-commissioners appointed for that purpose. The commissioners, as directed by the letter from King Charles the First, having declared the old rentals to stand for a valuation, the titular consenting, and the minister, the only other person interested, not opposing, that valuation took effect accordingly, and has stood unimpeached for nearly two centuries; for the Court of Teinds having, in the present action, repelled the objection, founded on an alleged dereliction, did thereby virtually find and declare that the sub-valuation had been the rule of payment downwards from the date of the valuation. Accordingly, no augmentation has been made to the minister ever since; and an application made by the minister in 1767 was dismissed, the Court being of opinion, that as the Teinds were *valued* and exhausted, they had no power to give an augmentation in such circumstances. On this distinct understanding, namely, that the teinds were valued and exhausted, and the lands not liable to be further burdened with augmentation of stipend, the appellant had purchased these lands, paid a price upwards of £8000 above the proved value, and it is but reasonable and just to expect that this sub-valuation ought not to be set aside on light or critical objections in point of form. But if the objection is of any force at all, it can only be upon the ground that the minister was not called as a party to the valuation by the sub-commissioners, or that he had no notice of the proceedings, and no opportunity of appearing for his interest; and that by his not appearing, his interest has been hurt by collusion between the heritor and the titular. Both the *presumptio juris* and *presumptio hominis* are against those suppositions, as the lands of Nether Arrochar and Upper Arro-

char stood precisely in the same situation—their valuation was going on at one and the same time; and it is in evidence that the minister made several appearances in the valuation of Nether Arrochar, and consented as to these, that the “auld rental of the teinds” should stand as formerly. The presumption therefore was, that the minister was cited to the valuation of the *Upper* Arrochar, or that he had appeared: And it would be extremely hard to require, at the distance of 160 years, the evidence of a regular and formal citation, when it is so established a rule of Court, that the grounds and warrants of decrees cannot be demanded after a period of twenty years from their date. A less rigid rule ought here to be adopted. Both these sub-valuations had already, in point of fact, been approved by a decree of approbation of 1769; and it was only in consequence of the mistake therein that the present process was resorted to; and also in order to have the improper deletion of the words, “of the teinds,” in one of the sub-valuations restored. In that former process of approbation, the present objections were equally competent that are now urged by the minister, but they were not stated: As to the cross appeal, had the valuation been of the stock and teind jointly, and not of the teind only, it would have been so expressed: but the business of the sub-commissioners was to report as to the value of the *teind*, and of course the 400 merks must be taken as the tithe only; and the deletion of the words must have happened by mistake or accident. As to dereliction, there are no grounds for sustaining this plea—a plea that carries with it such heavy consequences is never to be presumed. That the fanciful distinction of a dereliction from payment, partly of money and partly of corn, instead of corn generally, does not apply. If one sort of grain had been substituted for another, there might have been a change in the species of the payment, but not where money has been paid in place of grain; and dereliction was not to be presumed where the difference in amount was so small, probably arising in converting the grain into money, or from pure favour shown to the minister. The sub-valuations being neither irregular, nor without proof, ought to be sustained.

Pleaded for the Respondent.—In a process of sub-valuation before the sub-commissioners, it was necessary that all parties interested in the teinds should be present, or should be lawfully cited to attend. And it cannot be alleged or pretended that the minister was present, although in this

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1797. case he had the most important interest in the proceedings, being both titular of the teinds and parish minister, because the reverse is presumable from the evidence of the record, which mentions the names of so many other persons, but makes no mention whatever of the minister, and thus the proceedings laboured under a radical and fundamental defect. On the cross-appeal: On the point of dereliction. The stipend paid the minister for time far exceeding the long prescription is greater than the amount fixed and ascertained by the report of the sub-commissioners; and as it is clearly established law that any heritor who, *sciens et prudens*, pays either to the minister or titular more than the amount of the teind as fixed by the sub-commissioners, he must be considered as having abandoned the sub-valuation, and lost the benefit thereof by dereliction.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed, with £150 costs to the respondent in respect of the appeal: And it is farther ordered and adjudged, that the cross-appeal be dismissed this House: And it declared that the said order of dismissal of the said cross-appeal be without prejudice, it being unnecessary to enter into the matter of the same.

For Appellant.—*Sir John Scott, Wm. Adam.*

For Respondents.—*Ro. Dundas, Sir Wm. Grant, John Anstruther, Wm. Robertson, Arch. Campbell.*

[M. 2589.]

WM. CURTIS, E. MAITLAND, and JOHN NEWMAN, (Assignees under Messrs. GIBSON & JOHNSON's bankruptcy, London, } *Appellants;*

EDWARD CHIPPENDALE, Trustee on the Sequestrated Estate of WM. M'ALPINE & Co. Calico Printers, Scotland, } *Respondent.*

House of Lords, 23d February 1797.

COMPENSATION—RETENTION—BILL TRANSACTIONS—FOREIGN DEBT—RANKING.—Circumstances in which held (reversing the judgment of the Court of Session), that bankrupts in England were entitled to rank on a bankrupt estate in Scotland, without the latter

being entitled to set off against their claim, bills of the bankrupts in England which they had held, but which they had indorsed away for value, not being now holders thereof, and the proper holders having ranked on the bankrupts' estate in England.

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M'Alpine and Co. were traders in Scotland. Gibson and Johnson were bankers in London. Both became bankrupt, and the respondent was trustee on M'Alpine & Co.'s estate; the appellants being official assignees under the bankruptcy of Gibson & Johnson. The question which arose was, a claim of set off or retention made by M'Alpine and Co. against a claim lodged on their estate, by the official assignees of Gibson and Johnson, in the following circumstances:—

A great many bills drawn, indorsed, and accepted by M'Alpine and Co. had, in the common course of dealing, been indorsed to Gibson and Johnson by Livesey, Hargreave, and Co., and other persons, for good and valuable considerations paid by Gibson and Johnson: On the other hand, Gibson and Johnson having accepted various bills of exchange in the course of their dealings, these bills, in the course of circulation, had passed into the hands of M'Alpine and Co., who again indorsed them to others, receiving a full and valuable consideration; and at the time of Gibson and Johnson's bankruptcy, all these bills had a variety of names upon them as indorsers.

The objection by the respondent, trustee on M'Alpine & Co.'s estate, was as follows:—"Gibson and Johnson having claimed to be ranked for the sum of £25,801. 4s. 10d. as the amount of thirty-six bills drawn by the bankrupts (M'Alpine & Co.), upon various persons, and indorsed to the claimants." To this large claim, this general objection is stated, "That the bankrupts held bills to the amount of £22,513. 14s. 5d. accepted by Messrs. Gibson and Johnson, which the bankrupts indorsed away to different persons. These bills not being retired by Messrs. Gibson and Johnson the acceptors, were duly protested against them for not payment, and against the bankrupts and the other indorsers for recourse and payment, and are accordingly now claimed, and ranked on the estate of Wm. M'Alpine and Co. The claimants therefore can only rank for the balance, amounting to £3257. 11s. 5d., after setting off the amount due to M'Alpine & Co."

The Lord Ordinary, of this date, sustained the objection, Nov. 26, 1790. in respect of no answers; but the assignees of Gibson and Johnson afterwards appearing, and being heard, the Lord

1797. Ordinary adhered to his former interlocutor. On another representation, he took the case to report to the Court, who found the plea of retention well founded; and, on reclaiming petition, they adhered.*

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May 12, 1791.
Dec. 13, 1793.
Dec. 1, 1794.
Dec. 9, 1794.

* Opinions of the Judges:—

LORD PRESIDENT CAMPBELL.—“ I first consider the case upon the principles of the law of Scotland, and the rules of ranking founded on common law and reason, independent of any peculiarities with respect to compensation in the law of England.

2d. I examine whether there are any such peculiarities, and what effect these ought to have on the question.

1st. Point.—Suppose A as principal, and B as cautioner, owe £100 to C, and A becomes bankrupt, C claims upon his estate, is ranked for the whole debt, and recovers ten shillings in the pound, *i. e.* £50. He then recovers the other £50 from B; can B be admitted as a claimant also upon A's estate either for £100 or for £50? B has paid *ex mandato* for A £50, and to that extent (not to the extent of £100) he seems to have a just demand against A, and would certainly, if A were solvent, recover his payment; but the other creditors of A have an interest and title to object to any further claim upon his bankrupt funds for this debt, the same having already got its due proportion of these funds. If A shall afterwards acquire any funds, these may be liable, but not the bankrupt funds, which have already been claimed upon; for it is enough that each debt is ranked for twenty shillings in the pound. The same debt cannot be ranked for thirty shillings or forty shillings, whether in name of one creditor, or two or more jointly or successively; so it was laid down as clear law in the case of Sir John Anstruther, 27th May and 17th June 1790, which was supposed to be in a different situation.

“ The principal and the cautioner may, either jointly or separately, claim that the debt in question shall be ranked for its full amount to the effect of drawing the dividend belonging, in proportion with other creditors, but they cannot, in justice to the other creditors, in any form or shape whatever do more.

“ This principle applies equally, or rather *a fortiori*, to the case of indorsed bills; the indorsers being in a situation even less favourable than cautioners; for, after having parted with the bill by indorsation, they quit all hold of it for a time, and have no claim of relief against prior indorsers, drawer or acceptor, upon the contingency of the bill returning back upon them. No such action of relief, it is presumed, was ever attempted, as it is not founded in the nature of a bill: for the indorsation of a bill is not of the nature of a cautionary obligation. None of the rules with respect to cautionary, such as the benefit of discussion, septennial prescription, &c.

Against these interlocutors the present appeal was brought. 1797.

Pleaded by the Appellants.—The plea of set off or retention does not here apply. The two estates do not stand in CURTIS, &c.
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apply to it. Each indorsation is considered as a new draft or order, which subjects the indorser as drawer, if the bill happens to be dishonoured. But the law does not presume any such case until it really happens; and he is liable, not as cautioner but as principal, to pay his draft. When the bill does come back upon him, and when he pays it, either in whole or in part, he becomes the holder of that bill; and he may carry his claim backward to those who are liable to him. But the bill, as one entire debt, whether in the hands of one holder or another, or claimed upon by many holders, against the bankrupt estate of that person ultimately liable, can only be made the subject of one entire claim, and can only draw a dividend along with other creditors of the bankrupt according to that claim; for although there may be different persons concerned, yet the debt can only be ranked to one or all of them for twenty shillings in the pound, not for thirty shillings or forty shillings.

“ To illustrate this still more, suppose C, the holder of the bill, claims upon the bankrupt estate of A, the acceptor, for £100, and out of that estate draws ten shillings in the pound, *i. e.* £50, he also claims upon the bankrupt estate of B, the drawer and endorser, and receives five shillings in the pound, *i. e.* £25. Can B, or the trustee for his creditors, say, I must now also rank upon A's estate, in order that I may get this £25, for which I am just creditor to him, as having paid this part of the bill for him. If B is entitled to draw any thing at all out of A's estate, whether the dividend be more or less, he ought instantly to yield it up to C, because it is to him that every thing that can be recovered is due, until he is fully paid. But this would substantially resolve into a preference in favour of C, over all the other creditors of A, and would result in his obtaining perhaps fifteen shillings in the pound out of that estate, when other creditors who are *pari passu* with him, receive only ten shillings in the pound.

“ These principles appear obvious enough in a case of direct claim of ranking being made by two different persons, interested as creditors in the same debt. But the question is, whether the same objection occurs, where one of them has no occasion to make any claim at all, or at least delays it till a claim is made *ex alia causa*, in order that he may then have an opportunity of pleading compensation?

“ If this counter claim cannot be made directly for the purpose of ranking upon the estate of a debtor, which has been once claimed

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 CHIPPENDALE. the relation of debtor and creditor to each other. Had M'Alpine and Co. still been possessed of the bills, then retention, and compensation would have been pleadable by them against Gibson and Johnson's claim. But, by in-

upon for the same debt, can it be made indirectly, by stating it in the way of compensation or retention? The objection to such a course is, that, in order to make way for compensation or retention, the ground of the counter claim must be produced, and sustained as a good demand against the estate of the original claimant; and if it cannot be sustained as a good claim, neither can it as a ground of compensation or retention, *e. g.* if it shall happen to be prescribed.

“ The case here seems to be the same; for the holders of the bills having already claimed, and their claim having been sustained upon the estate of the acceptor, for the whole contents of these bills, they cannot be claimed on a second time by M'Alpine the indorser, *ergo* there are not *termini habiles* for setting them off by compensation or retention, for a bad debt cannot be set off against a good one.

“ Besides, if M'Alpine's trustee could make his counter claim effectual in this manner, out of the bankrupt effects of Gibson and Johnson, he would be obliged to yield up the advantage thereby acquired to the holders of the bills, to whom M'Alpine has only paid a small dividend. Compensation or retention operates as a preferable security, and this preference he must communicate to the party to whom he himself is bound, and at whose expense he is pleading it.

“ The debt which M'Alpine owes to Gibson and Johnson makes a part of the bankrupt estate of the latter, and if detained, the creditors of Gibson and Johnson will so far be deprived of their payment, and therefore M'Alpine makes this claim to the prejudice of the bill holders to whom he is bound.

2nd. Point.—Suppose these principles were inadmissible by the law of Scotland, yet if they are founded in the law of England, which would seem to be the case, it is next to be considered, whether we ought not in this case to decide according to the laws of England; as the question truly resolves into this, whether we ought to admit a plea of compensation against the assignees of Gibson and Johnson, suing for recovery of their debtors' estate here, or, in other words, whether a counter claim against that estate, which would not be admitted in England, can be set up here?

“ The principles of reconvention must be attended to in this question, Gibson and Johnson being an English house, the assignees under their bankruptcy must be permitted to recover their effects here, in order to divide them in England, according to the rule laid down in the cases of Thomson and Taler, &c; and although, in making that recovery effectual, they must be regulated by the law of

dorsing them away for value long before the bankruptcy of Gibson and Johnson, they thereby transferred their right to the holders, who are entitled to rank, and who have accordingly ranked on Gibson and Johnson's estate. It is a mis-

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Scotland, and must give way to the legal diligence of this country, the present question is of a different nature, for it goes to the validity of their claim, or rather to the constitution of a counter claim against them, which is supposed to be founded in a rule of the law of Scotland, but not in any rule of the law of England, which is the *forum* of the party against whom this counter claim is pleaded, and which alone ought to be regarded. See Huber, B. I. tit. 3, § 7. Lib. II. tit. 2, § 2, &c. Voet, lib. 5, tit. 1, § 7, 8, &c.

“ It is an important and very general question, whether being so reached by the jurisdiction of this court, so as to make way for a claim of debt against the bankrupt estate under their management, the adverse party is entitled to set up a plea of compensation and retention, however well founded in the law of Scotland, if it has no foundation at all in the law of England, to which last country the estate now claimed on belongs.

“ M'Alpine's trustee is undoubtedly entitled to meet the action these assignees have brought, by any good claim which M'Alpine may have against the estate of Gibson and Johnson, *i. e.* any claim which can in law be made effectual against that estate ; but the question is, whether they can meet it by a claim which is not good in law, and could not be made the subject of a direct demand against the assignees of Gibson and Johnson.—This does not go to the mere matter of forum, but to the nature of the debt, and the validity of the claim ; for it is admitted that Gibson and Johnson were liable in recourse upon these bills to M'Alpine ; but if it can be said that the demand of recourse, so far as it lay against the estate of Gibson and Johnson, is already satisfied, and that no further claim is admissible by the law of the country where the claim fell to be made, and where satisfaction was due, can the claim, by any circuitous mode of procedure elsewhere, be revived and set up again in the manner which is here contended ?

“ The distinctions laid down in the case of *Watson v. Renton*, 21st Jan. 1792, (Mor. 4582) appear to be founded in just principles. It is a mere accident that this demand against the estate of Gibson and Johnson comes to be made here in the way of exception. It is by accident that any part of the bankrupt estate of Gibson and Johnson (namely the money due by M'Alpine) happens to be in Scotland ; for England is the place of their residence and trade. It is not stated that Scotland was the *locus solutionis* with respect to these claims which M'Alpine had against Gibson and Johnston. England

1797. take, therefore, to hold that their right to compensation is
 ————— upon the bills themselves, and therefore in existence before
 CURTIS, &c. the bankruptcy of Gibson and Johnson, because at that time
 v. they were not the holders of these bills. They are not *now*
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therefore was the *locus solutionis* as well as *locus contractus*, with respect to those bills so accepted and issued by Gibson and Johnson; and the nature and the extent of the obligation ought to be regulated by the law of England, and not by the law of Scotland, if there be a difference betwixt these two laws.

“ Suppose the debt which is the subject of the counter claim, were cut off by prescription, or by some short limitation of the law of England, while the other debt is entire by the law of Scotland, and no such short limitation takes place here, it is thought that the limitation of the law of England would be pleadable against the counter claim. In the same way, if by some municipal rule the counter claim is good in England, while it is contrary to the law in Scotland, it is thought we must sustain it, when set up here against an English estate. What is said about the law merchant and *jus gentium*, &c. is also misapplied to this branch of the argument.

“ A position is laid down, that if all parties were solvent, M'Alpine would be entitled to say, “ I won't pay you my acceptances till you relieve me of yours, which I have indorsed away; and then it is said, insolvency can make no difference. But, 1st. Such a defence against payment of an accepted bill, it is believed, would not be listened to without producing the counter acceptances themselves, even in a case of solvency. 2nd. One half of the fact is here kept out of view, viz. that the bills which are the subject of the counter claim have actually been claimed upon, and drawn its dividend, and is now claiming to be ranked a second time. It is said that the inequality or the preference arising from compensation is legal and fair, and certainly it is so, and indeed is at bottom no inequality at all, in those cases where it applies. But what is the case here? The demand is carried much further. The two original parties, Gibson and M'Alpine exchanged their acceptances to the extent, we shall say, of £20,000 each. If each party still had these bills in his own hands, they would be set off against one another, and there would be no loss arising from the transaction either to the one estate or to the other. But M'Alpine has indorsed away Gibson's bills, and the indorser has already claimed upon Gibson's estate, and drawn five shillings in the pound, i. e. £5000 out of it. Now, in what situation does Gibson stand. He has not a farthing in his pocket arising from M'Alpine's acceptances, and when he produces them, in order to rank upon M'Alpine's estate, he is met with a plea of compensation to the extent of the whole of Gibson's acceptances, i. e. that no-

the holders of them. The real holders have actually proved them under Gibson and Johnson's commission as acceptors. The same bills cannot be proved twice over, and receive a double dividend. The contract of the acceptor is single; and although the benefit of it may be transferred from hand to hand, yet it cannot be split so as to remain entire both in the indorser and indorsee at one and the same time. He is bound to pay the bills only once, and to one person; and if M'Alpine and Co.'s claim be considered as a claim upon the bills, it is evident that Gibson and Johnson's estate would, if it were sustained, pay that twice over. The question always must be, in the distribution of a bankrupt's estate, were M'Alpine and Co. creditors of Gibson and Johnson at the time of the latter's bankruptcy? because the right of parties, as at the date of that bankruptcy, must govern the distribution of the estate. Now it is clear that, before this event, M'Alpine and Co. had indorsed away these bills, and thereby ceased to be holders. They admit this, but maintain that, as indorsers, they are to be viewed as cautioners, and

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thing at all is to be paid. The result of this is, that Gibson and Johnson's estate just loses £5000 upon the transaction, and M'Alpine's estate has gained £17,500, partly at the expense of Gibson and Johnson, and partly at the expense of an onerous indorsee. There is surely no equity here, and it is plain that M'Alpine is demanding what is already in his pocket (at least must be presumed to be so). He is not contending for indemnification, but is *in lucro captando*."

LORD JUSTICE CLERK.—"The question must be determined on the common law of Scotland. It is not a question of ranking, but of compensation. If I have a pledge, I am entitled to retain it for the claim of debt due to me, although part of my debt has been recovered. Although my estate has paid all that it could pay, I am still personally liable, and so also is any estate I may subsequently acquire."

LORD HENDERLAND.—"I doubt if retention can be carried so far as the present plea of compensation. If these bills have already been ranked on *M'Alpine and Co's*. (Gibson and Johnson's?) estate, they cannot be ranked and draw any further. Therefore no room for pleading retention on them."

LORD ESKGROVE.—"I am clear for adhering to the former judgment."

LORD SWINTON.—"What he draws by compensation, he does not draw from the estate. I am therefore for adhering."

The Lords adhered.

Vide President Campbell's Session Papers, vol. lxxv.

1797. **_____** so entitled to all the remedies which the law affords to a
 CURTIS, &c. cautioner. Yet this, the foundation of their whole case,
 v. fails because indorsers of bills are *not* mere cautioners but
 CHIPPENDALE. principals. Indorsers receive the value of the bill from the
 indorsee, and, on doing so, sell it absolutely to him. Their
 right cannot again revive, unless they pay the bill, and
 thereby become again the holders, and they and the accep-
 tors are mere strangers to each other. Besides, this being
 an English debt, arising out of an English transaction, and
 due to an English insolvent estate, must be governed by the
 English law. In England, if the surety or cautioner has not
 paid, he has no claim; the bankrupt law there destroys
 these remedies, and it is submitted that it is according to
 that law that the case ought to be decided.

Pleaded for the Respondent.—The present question oc-
 curs in a Scotch court of law, and regards the claim of cre-
 ditors in a bankrupt estate *in manibus* of that Court, and
 must be determined by the law of Scotland; and cannot be
 influenced by the law of England on the subject. Although
 in questions of a mercantile nature, it is competent and fit-
 ting to resort to that law for illustration and authority, yet
 this can only take place in questions in regard to the consti-
 tution, transmission, or extinction of debts due by mercantile
 documents; but can have no place in questions regarding the
execution against the *person* or *effects* of a debtor. These
 must always be regulated by the law of the country where
 such execution is sued out, and consequently, if by this latter
 law, it can be shown that there is room for pleading compen-
 sation or retention, full effect will be given to the plea. And
 whatever may be the case with compensation which may
 require that the debt should be presently due to the party,
 and the documents thereof in his hand; the case is totally
 different with retention, which is a defence that must meet
 every claim of debt. Accordingly, on this subject the au-
 thorities in the law of Scotland are clear beyond a doubt.
 A claim may be made back upon these bills against M'Alpine
 and Co., who, on the acceptor's failure, are undoubtedly
 liable, and the law of Scotland allows retention to be plead-
 ed, whether the debt be already due, or one that has not yet
 fallen due, on a future debt, a contingent debt, or an obli-
 gation of relief upon whatever ground arising, and, conse-
 quently, by the law of Scotland, M'Alpine and Co. are en-
 titled to the compensation or retention they claim.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be reversed.

And it is farther ordered and adjudged, that the said cause be remitted back to the Court of Session in Scotland to rank the appellants, pursuant to their claim, to the amount of £25,081. 4s. 10d., and to proceed farther in the cause according to justice.

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v.
MACKENZIE,
&c.

For Appellants, *Sir J. Scott, J. Anstruther.*

For Respondent, *J. Mitford, W. Grant.*

[M. 2325.]

JAMES EARL OF FIFE, *Appellant;*
MRS. MACKENZIE and ELIZABETH FRAZER, *Respondents.*

(*Et e contra.*)

House of Lords, 6th March 1797.

CLAUSE—EXECUTRY—RENTS—DESTINATION.—A clause conveying all moveable goods, gear, and effects, belonging to the party at death, held not to carry debts and sums of money, bank notes, &c., but only *ipsa corpora*.

In 1768 Mr. Udny, who possessed considerable landed estate, married Mrs. Margaret Duff, a widow, and took the name of Mr. Udny Duff. A few months afterwards a *post-nuptial* contract was entered into between them, whereby Mr. Udny Duff, on his part, “ assigns and disposes to and “ in favour of the said Mrs. Margaret Duff, in case she shall “ happen to survive him, and to *her heirs, executors, and assignees*, the whole moveable goods, gear, and effects, “ which shall belong to him at the time of his death, including heirship moveables, household furniture, outsize and “ insight plenishing, silver plate, jewels, and linen, and in “ general, all moveable goods and effects of whatever kind “ and denomination, that shall belong to him at the time of “ his death, and that free of all debts and deductions whatever.” He also charged his estate with an annuity to her of £300 in case she survived him; in consideration of which, and on her part, Mrs. Duff became bound “ to convey to “ her husband, his heirs and assigns, her whole heritable “ and moveable estate which presently do belong to her, or “ which may fall, accresce, or belong to her at any time “ hereafter during the subsistence of the marriage, and par-

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&c. "ticularly." Here followed an enumeration of several heritable bonds and other real estates, and amongst others, the *lands and estate of Forresterhill*. She further, as to her moveable estate, "assigns and disposes to and in favour of the said Alex. Udny, Esq. her husband, *his heirs and assignees*, the whole "moveable goods, gear, and effects which shall belong to "her at the time of her death, including heirship moveables, "household furniture, outsize and insight plenishing, silver "plate, jewels, and linens, and in general all moveable "goods and effects of whatever kind or denomination which "shall belong to her at the time of her death."

April 25, 1797. The day after the contract Mrs. Duff executed a deed to vest her husband in the different subjects she had become bound by the contract to convey; and four days thereafter

April 29, — Mr. Udny Duff executed a deed, bearing to be for the love, favour, and affection he bore to his wife, did "assign, "transfer and dispoise, to and in favour of the said Mrs. "Margaret Udny Duff, my spouse, her heirs and assigns, in "case she shall happen to survive me, and not otherwise, "the subjects underwritten, viz." Here the subjects which Mrs. Duff had in the above marriage contract conveyed to him were enumerated, including the lands of Forresterhill. In this deed there was this clause of warrandice, "And "which dispositions, assignations, and translations, I bind "and oblige me and my foresaids to warrant to the said Mrs. "Margaret Udny Duff, and her above written, from all "facts and deeds done, or to be done, by me in prejudice "hereof alienably."

Sept. 1789. Mr. Duff sometime thereafter sold part of the lands of Forresterhill for £5208, with Mrs. Duff's concurrence. The price was laid out on bonds payable to himself, without any mention of his wife. He died intestate in 1789, being survived by his wife without issue, and leaving personal estate, (exclusive of household furniture or moveables corporeal), to the amount of £15000.

The two neices of the deceased, the respondents, without any opposition from Mrs. Duff, confirmed as being next of kin of their deceased uncle, by which they took possession of all debts and sums of money pertaining and due him by bonds, bills, promissory notes, leaving the widow to take under the contract *ipsa corpora* of all moveables.

It appeared that, in executing the contract, the original draft of that deed contained a conveyance to his wife of his own moveable estate, in case she survived him, in broader

terms: thus,—“all debts and sums of money which shall
 “belong to him at the time of his death, together with,”
 &c., but these words were deleted in Mr. Udney Duff’s own
 handwriting, and thus struck out of the clause regarding
 the moveable estate.

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Mrs. Duff thereafter died, leaving her whole personal
 estate and effects to her near kinsman the Earl of Fife, and
 appointing him her sole executor; and conceiving that
 she had a right, after her husband’s death, to the whole per-
 sonal estate of which he had died possessed, including
 money, arrears of rent, &c., and not to the *ipsa corpora* of
 such moveables as household furniture, &c., he brought the
 present action against the two neices, who had taken pos-
 session of the money, for repayment of the same. He
 brought a separate action for the purchase money of those
 parts of the lands of Forresterhill which Mr. Udney Duff had
 improperly sold and appropriated to his own use, in breach
 of the marriage settlement. On the other hand, a counter
 action was brought by the respondents against Lord Fife, as
 representative of Mrs. Udney Duff, praying, 1st, for an account
 of the arrears of rent uplifted during the subsistence of her
 marriage with Mr. Udney, collected by her under a factory;
 2d, That the appellant should restore the rents of Mrs.
 Udney’s estate for the half of crop 1789, and the arrears of
 rent due at Mr. Udney’s death. 3d, That the appellant
 should deliver to the respondents, as next of kin of Mrs.
 Udney, the whole effects that belonged to Mrs. Udney at the
 time of her death.

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There were thus three points for disposal.

1st. Whether by the clause in the marriage contract, the
 husband had conveyed to Mrs. Udney Duff *his whole personal*
estate, or only the *ipsa corpora* of moveables, as distinguish-
 able from debts and sums of money.

2d. Whether the respondents, Mr. Udney’s representatives,
 are liable to account to the appellant for the price of Mrs.
 Duff’s lands of Forresterhill, sold by Mr. Udney Duff as a sur-
 rogatum for these?

3d. Whether the respondents (Mr. Udney’s representa-
 tives), are entitled to the *corpora* of the moveables which
 belonged to Mrs. Udney Duff at her death, these by the con-
 tract being conveyed to “her husband, *his heirs and assig-*
nees,” or whether the Earl of Fife, as executor under Mrs.
 Udney Duff’s will, executed after the death of her husband,
 was so entitled to these.

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 May 14, 1795.

The Court pronounced this interlocutor: “ Find that the conveyance in the contract of marriage by Alexander Udny Duff, in favour of Mrs. Udny Duff, in the event of her surviving him, extends only to the *ipsa corpora* of moveables, and does not include debts or sums of money : Find that the clause in the said contract, giving to Alexander Udny Duff, his *heirs and assignees*, the moveable effects that should belong to Mrs. Udny Duff at the time of her death, does not entitle the heirs or executors of Mr. Udny Duff to make any claim to these effects, in competition with the Earl of Fife, the general disponee of Mrs. Udny Duff, or with Robert Duff of Fetteresso, who has entered a claim to some of them as a special legatee : Find, that the executors of Alexander Udny Duff has right to the arrears of rent due upon Mrs. Udny Duff’s estate at the time of his death ; and also to one half of the rents payable for crop 1789 ; repel the mutual claims made by the parties upon each other for the rents of Mrs. Udny Duff’s estate uplifted by her or her husband, during the subsistence of the marriage : Find that the executors of Alexander Udny Duff, are not accountable to the Earl of Fife for the price of the lands of Forresterhill, sold during the subsistence of the marriage, and remit to the Lord Ordinary to proceed accordingly.”* On reclaiming petition the Court adhered.

* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL.—“ This is a question of succession between the heirs of the husband and wife, under postnuptial settlements. 1st Point.—The words moveable goods, gear, and effects, may be variously construed, according to circumstances. In the present case, all the circumstances show that they must be taken in a limited sense, and so Mrs. Duff herself understood the matter. 2d Point.—The clause to which this refers seems to have been put into the contract without any particular instructions, as a counterpart of the other, though it was unnecessary if it meant *in the event of his surviving*, this having been done already by the preceding clause ; and if it meant otherwise, it was merely testamentary, and not of the nature of a provision, so that she could alter it at pleasure *quoad* his heirs. Indeed it ought to be considered as lapsed altogether by his predecease, like a legacy left in the same terms. 3d Point.—Any arrears of rent unuplifted by her at her husband’s death must belong to his executors. 4th Point.—The executors

Against these interlocutors the present appeal was brought by Lord Fife, and cross appeal by the respondents.

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Pleaded for the Appellant.—It is quite irrelevant to inquire into the intention of parties in executing a deed, and to gather that intention from collateral circumstances, or from separate evidence, because whatever may have been the intention, when the words used are clear and unambiguous, the rule is, as Lord Stair says. “*In claris, non est locus conjecturis*, and judges may not arbitrarily interpret writs or give them a sense inconsistent with the clear words.” The terms used are clear, and have a precise legal signification, which cannot and ought not to be explained away. Mr. Udny assigns *the whole moveable goods, gear, and effects*, which should belong to him at the time of his death. It is indisputable that moveable effects is a term synonymous with personal estate, and comprehends debts due to the assigner, as much as *corpora mobilia*. But the clause explains further that it not only includes heirship moveables, household furniture, but also in general “*all moveable goods and effects of whatever kind or denomination*.” Unless it can be maintained, that debts and sums of money are not moveable, it is difficult to see how they are not comprehended under the above words of destination as fully as if they were specially named. 2. And as to Mrs. Udny Duff’s lands of Forresterhill, it was clear that it was a part of the original contract, that these lands were to be reconveyed to her, and though this was done by a separate deed, bearing to be for love, favour, and affection, yet that the obligation under the marriage-settlement was not the less binding, which was fenced by absolute warranty; and, 3. As to the claim made by the respondents, as Mr. Udny Duff’s representatives, for the *ipsa corpora* of the moveables belonging to Mrs. Udny Duff at her death, in terms of the marriage-contract, they had no right to these,

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can never have any claim to what was uplifted by Udny himself; and as to what she may have uplifted and applied to her own uses, it does not appear that there was any such thing done, or if done, it was with her husband’s consent. 5th Point.—The sale of this estate after these settlements, and taking the bonds payable to himself and his own heirs, was a virtual revocation.”

LORD JUSTICE CLERK.—“A general clause is not to be extended to particulars of greater value than those enumerated.”

LORD SWINTON.—“Of the same opinion.”

Président Campbell’s Session Papers, vol. lxxvii.

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as after her husband's death she was absolute owner, and might dispose of them either gratuitously or otherwise as she pleased. Whereas, if the respondents' claims were sustained, then Mrs. Udney Duff's right over these would be reduced to a mere liferent, which is totally inconsistent with the terms of the grant to her and her heirs, executors and assigns.

Pleaded for the Respondents.—1. The clause in the marriage-contract in question only gave to Mrs. Udney Duff the *ipsa corpora* of the moveables. The debts due to him, the bonds, bills, bank-notes, money, &c., were not carried to his wife by the clause, and consequently left to be taken up by the respondents as his next of kin. If it had been intended to convey such estate, it was necessary for the maker to use such words as the following: "All debts and sums of money which shall belong to me at the time of my death, whether due to me by bond, bill, or in any other manner, together with the whole moveable goods, gear, &c." The words *goods, gear, and effects*, are undoubtedly clear and unambiguous; but in practice have only a limited signification, and do not extend to sums of money, or *nomina debitorum*. 2. In regard to the lands of Forresterhill, it was clear, after Mrs. Udney Duff reconveyed these to her husband by the postnuptial contract, he was absolute fiar, and this even though three days thereafter he conveyed these lands back again to his wife for love, favour, and affection. But even supposing his right was more limited in its character, there was nothing to prevent Mrs. Udney Duff to sell these lands, with concurrence of her husband, so as to entitle him to do with the proceeds as he pleased. There is no evidence that the original conveyance by the wife to her husband was conditional, only upon his reconveying back the same to her. Nor was the reconveyance *pars ejusdem negotii* with the contract of marriage; and therefore the respondents were not entitled to account for the price of these lands. 3. In reference to the *ipsa corpora* of the moveables belonging to Mrs. Udney Duff at her death, it is clear these were conveyed by her to her husband, *his heirs* and *assignees*, by the marriage-contract in every event, and without the condition of her husband surviving her. And it therefore follows, that these pass to the respondents as *his heirs*; it not being in the power of Mrs. Udney Duff, after such a conveyance, to defeat the destination in her marriage-contract, by a gratuitous and voluntary deed in favour of the appellant, Lord Fife.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellant.—*W. Grant, Thomas M'Donald.*

For Respondents.—*Sir J. Scott, Wm. Tait.*

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LIDDERDALE

v.

DOBIE.

WM. ROBERTSON LIDDERDALE, Esq., . . . *Appellant;*
MUNGO DOBIE, Writer and Messenger, . . . *Respondent.*

(*Et e contra.*)

House of Lords, 10th March 1797.

DAMAGES FOR ILLEGAL AND OPPRESSIVE PROCEEDINGS.—Circumstances in which a party who had filed an indictment of perjury in England against a party in Scotland, and afterwards obtained sentence of outlawry against him, was held liable in £300 damages, and £740 of expenses, and £200 for costs of appeal.

This was an action of damages raised by the respondent, residing in Dumfries, for certain oppressive and illegal proceedings adopted by the appellant, arising out of the purchase of the lands of Castlemilktown, made by him in 1777.

For one half the year the appellant resided in Dumfriesshire, the other half in London.

Part of the price of the lands had been paid by him to the seller's creditors, for whom the respondent acted as factor or trustee.

It was stated, that when only the balance of £767 remained unpaid, that the respondent came to London and made affidavit that the appellant was indebted to the respondent in the sum of £1030, upon a decree of the Lords of Session. Upon which a bill being filed, the appellant was arrested and held to bail for that sum for a week, until bail was found accordingly. The appellant defended this action, and in consequence of the respondent not being able to prove or produce the decree mentioned in the declaration, he was non-suited.

The appellant having then preferred an indictment for July 19, 1786. perjury in England against the respondent, the grand jury found the bill, and a warrant, signed by Lord Mansfield, was issued to apprehend the said Mungo Dobie.

1797. The appellant carried the warrant to Scotland, and procured one of the justices of peace of Dumfries-shire to indorse it. The appellant had read the warrant to several persons, by way of injuring and ruining the respondent's character. He was apprehended and brought before the justice of peace, who, in consequence of there being no witness to prove the signature of Lord Mansfield, discharged the prisoner. Notwithstanding, the appellant proceeded to have the respondent outlawed in England. Sentence of outlawry being pronounced in 1788.

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On these proceedings the present action of damages was raised, and a proof led by the pursuer, to show that the appellant was actuated by a desire to ruin his character.

Feb. 9, 1791. The Court, upon the report of Lord Rockville—"The Lords find the charge of perjury, exhibited by the defender against the pursuer before the court of England, founded upon certain proceedings in the Court of Session, was groundless and oppressive, the sum truly due by the defender upon the 3d May 1785, having been at least equal to the amount sworn to by the pursuer; but find, that in the present situation of matters, while the sentence of outlawry remains in force against the pursuer in England, the Court cannot with propriety give redress, and therefore supersede further proceedings in this cause till proper steps are taken for obtaining a reversal of that sentence."

Feb. 14, 1793. The sentence of outlawry having been afterwards reversed, in absence of the appellant, the Court thereafter found the respondent entitled to damages, and modified the same to £300, and decerned therefor; and having advised the state of expenses for the pursuer, decerned against the defender in £740 of expenses.

Mar. 3, 1795.

Against these interlocutors the present appeal was brought by the appellant, and a cross-appeal by the respondent, in so far as the damages awarded were inadequate.

After hearing counsel, it was

Ordered and adjudged that the original and cross-appeals be dismissed, and that the several interlocutors therein complained of be affirmed. And it is further ordered, that the appellant in the original appeal do pay, or cause to be paid to the respondent in the said appeal, £200 for his costs, in respect of the said appeal.

For Appellant, *Sir J. Scott, J. Campbell.*

For Respondent, *W. Grant, W. Garrow.*

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[M. 6936.]

DRUMMOND
v.
DRUMMOND,
&c.

CAPTAIN FRANCIS PINKERTON DRUMMOND, *Appellant* ;
DR. WILLIAM ABERNETHY DRUMMOND, Life-
renter of the Estate of Hawthornden, and
MARY, wife of Lieut. JOHN FORBES, of the
Royal Navy, Fiar of the Estate of Haw-
thornden, } *Respondents.*

House of Lords, 26th April 1797.

CHARTER AND SASINE—ERROR—SERVICE—VICENNIAL PRESCRIPTION.—A charter and sasine expedé as flowing from the crown, contained a destination, by mere accident or ignorance of the writer, in terms different from its warrant: Held, that these deeds were to be interpreted according to their warrant, and that the service *in special* of the next heir who succeeded was not null and void, founded on such erroneous charter and sasine, it being protected by the vicennial prescription.

On the occasion of the marriage of William Drummond, younger son of William Drummond, elder of Hawthornden, an antenuptial contract was entered into, whereby William Drummond, elder, the father, who stood regularly infeft in the estate of Hawthornden and others, by an investiture holden of the crown, became bound, “duly and validly, and June 7, 1722.
“sufficiently, to infeft and seize the said *William Drum-*
“*mond, his son, and the heirs male of his body*; which fail-
“ing, the heirs male of the said William Drummond, elder,
“his body; which failing, the heirs female of the said Wil-
“liam Drummond, younger, his body; which failing, the
“heirs female of the said William Drummond, elder, his
“body; which all failing, the said William Drummond,
“younger, his heirs and assignees whatsoever, heritably and
“irredeemably.”

The contract contained a procuratory of resignation by which the son, William, might have resigned into the hands of the Crown, as his immediate superior, and obtained charter and been infeft. But he preferred to avail himself of the precept of sasine, also contained in the contract, and was base infeft in the precise terms of destination as above.

Afterwards he expedé a charter from the Crown, proceed- 1724.
ing in the usual way by signature and resignation. The sig-
nature was duly passed in Exchequer, ordaining a charter to

1797. be expedite in the precise terms of the destination in the marriage-contract as above. But when the precept came to be made out for expediting the charter, in place of framing it so as to be an exact translation of the signature, which was its warrant, and from which it ought not to have deviated, yet through the ignorance or inattention of the writer, the dispositive clause ran as follows:—"Dedisse, concessisse, et disposuisse, dilecto nostro Gulielmo Drummond, juniori, de Hawthorden, filio natu maximo Gulielmo Drummond senioris ejusdem, et hæredibus suis masculis; quibus deficient. hæredibus masculis dict. Gulielmi Drummond, senioris; quibus deficient. hæredibus femellis dict. Gulielmi Drummond, junioris; quibus deficient. hæredibus femellis dict. Gulielmi Drummond, senioris; quibus deficient. dict. Gulielmo Drummond juniori, hæredibus suis seu assignatis quibuscunque hæreditarie et irredeemabiliter."

The discrepancy between the charter and its warrant, consisted in this, that the words in the signature, "Heirs male of his body," are translated "hæredibus suis masculis," which probably arose from the framer of the precept conceiving that these terms had precisely the same meaning, and, therefore, that the very important addition of the words "*de corpore*," were unnecessary. Upon this infestment followed; and the son possessed on this during his life.

William Drummond the elder had no other son, but had five daughters; the first, second, third, and fifth died without issue. Ann, the fourth, had issue by her husband, the Rev. John Pinkerton, namely, a son, who is the pursuer in the action of reduction, and appellant in the present appeal.

William Drummond the younger died, leaving issue of his marriage, Barbara Mary Drummond, afterwards married to Dr. William Abernethy Drummond, one of the respondents. In her marriage-contract with him, she disposed the estate "to, and in favour of herself in fee, and the said doctor her husband, in liferent, for his liferent use alienably." In making up her titles, the error in the dispositive clause of the charter was discovered, whereby the estate was devised *hæredibus masculis et femellis* of William Drummond younger and elder, without limitation, in place of the heirs male and female of *their bodies* respectively; and to prevent the estate from being carried off by the *heirs male whatsoever* of her father and grandfather, she raised an action of reduc-

tion and declarator, to have it found that the charter and infestment were erroneous and disconform to the procuratory of resignation, contained in the contract of marriage. Decree was pronounced, declaring accordingly, and that she had good right to make up her titles, as heir of provision to her father. But the difficulty came to be, how, and by what effectual mode, she was now to make up her title. The procuratory in the contract of marriage, it was said, was already executed and exhausted, so could not be executed a second time ; but the plan recommended by the Court was, to pronounce a special interlocutor, finding her entitled to serve heir of provision to her father, which would be a direction to the inquest to serve her ; the interlocutor, at same time, being inserted in the service.

Thereafter the property and superiority, which, in consequence of William Drummond, the younger's, original base infestment, were supposed to be separate, were conjoined ; and soon thereafter, Mrs. Abernethy Drummond, her own issue having died, adopted the other respondent, Mrs. Forbes, and disposed the estate " to her husband in liferent, and to Mrs. Forbes in fee." The estate went thus into the hands of strangers, although there was issue of William Drummond, elder, still alive.

Notwithstanding all the steps taken by Mrs. Drummond to make her title unexceptionable, action of reduction was raised, first by Mrs. Nairn, the daughter of William Drummond, elder, and sister of William Drummond, younger, and afterwards continued by the appellant, the son of another sister. The grounds of the reduction were, that notwithstanding the decree of the Court of Session, and the special service following thereon and infestment, that the whole were void and null, as in competition with the appellant's rights ; that, in point of fact, Mrs. Drummond died in a state of apparency. That her service and infestment in 1761, under the charter and infestment 1724, obtained by William Drummond, younger, *other* heirs were called by him, in preference to Mrs. Abernethy Drummond. That this charter and infestment being disconform to its warrant, ought to have been reduced before any of the heirs could, under the contract 1722, have a proper and complete title as heir of provision to the estate ; and, consequently, that the appellant had good right to reduce the erroneous charter and infestment taken by William Drummond, younger, which had never been reduced. In defence.—1. Even sup-

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posing Mrs. Abernethy Drummond's service, which was expedited in 1761, had been erroneous, it was secured from challenge, by the vicennial prescription. 2. That independently of the charter and decree of the Court in 1761, finding that William Drummond's charter of 1724, was erroneous, and that Mrs. Drummond was entitled to serve heir of provision to her father, as if that charter and infeftment had been properly expedited; yet, by the clause of confirmation, in the charter 1724, whereby the base or subaltern infeftment of 1723, in favour of her father, became a public one, was sufficient to support her service. And, 3d. That Mrs. Abernethy Drummond had a *jus crediti*, or personal right vested in her, under the contract 1722, which was fully competent to render effectual any settlement executed by her of the estate of Hawthornden.

May 18, 1793. The Lords, of this date, repelled the reasons of reduction;* and, on reclaiming petition, they adhered.
 June 6, —

* Opinions of Judges :—

LORD PRESIDENT CAMPBELL.—“ This is a question upon family settlements, where there occurs an erroneous charter. The decree 1761 was meant as an explanation of the true import of the charter, and, if it has that effect, the question is at an end. Every circumstance attending this charter, and particularly the clause of confirmation, shows that no alteration of the line of succession was meant, as indeed none would be made in that form. Words are often used improperly by ignorant conveyancers. Vide case of Linplum.

“ 1st Point.—Whether the present action is barred by the vicennial prescription of retours is a little nice. It is not exactly the case which the statute had in view, and the other heirs female were not adverse parties, nor would have maintained any competition, so that they were truly *non valentes agere*.

“ 2d Point is, Whether the proceedings in the action brought for rectifying the mistake were not very accurate? It would have been better if Mrs. Drummond, to pave the way for it, had made up a title by general service as heir of provision under the contract. However, as she afterwards expedited a special service as heir of provision under the contract and charter together, which includes a general service, this may be considered as accrescing. It would likewise have been better that the conclusions in the declarator had been more distinct, and that the judgment of the Court had been more clearly adapted to them. But the interlocutor seems founded on the first conclusion or a part of it. But supposing these inaccuracies in point of form were fatal to the decree 1761, it would still be com-

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Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The charter expedé by William Drummond, younger, was the only feudal investiture of the estates in question, as held immediately of the Crown, ever made up in his person, and, consequently, till that in-

petent for the Court to explain the charter 1724, by finding and declaring that the general words *heredes masculi* are to be construed agreeably to the signature and contract which were its warrants ; and this is evidently the sense of the matter, for the charter, being the operation of the writer, would not alter the destination, nor be in any respect different from its warrants. Vide *Burn v. Adam*, 17th Feb. 1779 (Mor. 8852.) A court of freeholders may be tied down to the charter alone, but the Court of Session is not. The Court therefore ought to have found, and may still find, that *heredes masculi* in this charter must receive a limited construction, so as to mean heirs-male of the body alone ; and upon that construction we ought next to find that the special service of Mrs. Drummond, under the charter so constituted, is good. There are cases in which the Court has limited the construction of *heirs female*, Dict. vol. iii. p. 73 ; and the same may be done as to heirs male, if circumstances require it, though, in general, it is a delicate matter to meddle with technical words.

3d Point is the confirmation.—This is attended with difficulty, as the base infestment under the contract does not seem to have been in view nor produced ; yet it would rather seem that the confirmation was good.

“ The 4th Point is, connected with the second point, and is well-founded. Mrs. Drummond either had a *jus crediti* under the contract which she could carry without service, though perhaps not transmit (see *Kilkerran*, p. 464) ; or she was heir of provision under that contract, and by a service might connect herself with it. The last was rather the case. In fact, laying aside the charter altogether, and supposing it inept, she was served heir of provision under the contract ; for her special service under the charter, and referring to the contract as its basis, was tantamount to a general service under the contract. So that in every view she carried the right of succession, and either the feudal right under the charter, properly construed, or the personal right under the contract, if the charter be null, is complete in her. In this last view, however, the base infestment would remain to be taken up.”

LORD JUSTICE CLERK.—“ The right could not go without a service. But the confirmation was good. A general confirmation was sufficient to take up every thing. The execution of the procuratory was absurd. The vicennial prescription would not do.”

LORD ESKGROVE.—“ I think the former judgment conclusive.”

LORD PRESIDENT.—“ I think the same.”

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vestiture was actually set aside, a service as heir *in special* to him by one who was not called by the destination *therein*, and not the next heir according to it, entitled to succeed, was irregular and inept. The service, therefore, of Mrs. Abernethy Drummond, as heir-female of provision, was undeniably so, unless the decree of the Court of Session 1761 operated to alter that charter, which it did not or could not do; because the destination being to heirs-male general of William Drummond, there could be no room for the succession of a female, unless it had been proved that no heirs-male existed, which was impossible, as such heirs-male did exist. The decree of the Court of Session in 1761 did not and could not in law remedy the defect. Such decree could not alter the ordinary rules of law in regard to a service. The service is for the jury to give a verdict, as answers to certain questions of fact. If Mrs. Abernethy Drummond served herself heir of provision to her father, then, the first question was, "In what lands her father died last vest and seized?" which answer can only be made by production of the deceased's charter and sasine. And the next question is, Whether the claimant be the nearest and lawful heir under that investiture, so as to show that she was heir of provision? Now, the investiture did not show that she was the nearest heir; and had it not been for the decret of the Court of Session, and the direction therein, the jury could not have served her. But this direction of the Court, compelling the jury to find contrary to fact and evidence, being bad, the whole service was inept.

Pleaded for the Respondent.—That the destination in the charter of 1724, of William Drummond, younger, said to be erroneous, might be soundly construed, when read with reference to its warrant, to import the same heirs as those specified in the contract of marriage. That it was from the contract of marriage Mrs. Abernethy Drummond's right flowed, whereby, on failure of heirs-male of the body of her father and grandfather, she succeeded as heir-female under the marriage contract; and had, before she succeeded as heir of that marriage, a *jus crediti*, and afterwards an absolute right as fiar, entitling her to dispose of the estate in any manner she pleased, notwithstanding the substitution therein. Supposing her service to her father, and her title otherwise made up, were defective, still there was a right in her, under the contract of marriage, sufficient to support the conveyance to the respond-

ents. But her service now was protected from challenge by the vicennial prescription introduced by the statutes 1494, c. 57, and 1617, c. 13. Besides, this service was supported by the solemn decree of the Court of Session in 1761, upon which it proceeded: And, independently of this, the service ought to be sustained, because the charter taken by William Drummond, her father, in 1724, was a charter of resignation and *confirmation*. It confirmed his previous base infestment, the destination of which was conform to the destination in the marriage-contract; and, upon this right alone, she was entitled to serve heir in special to her father.

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After hearing counsel, it was

Ordered and adjudged, that the interlocutors be affirmed.

For the Appellant, *W. Adam, Wm. Honzman.*

For the Respondents, *Sir John Scott, Sir Wm. Grant, J. Anstruther, Chas. Hay.*

GEORGE JONES, Proprietor and Manager of the Amphitheatres of Edinburgh and Glasgow,	} <i>Appellant;</i>
MESSRS. LINDSAY & Co., Wood-merchants in Glasgow,	
	} <i>Respondents.</i>

House of Lords, 17th May 1797.

BUILDING CONTRACT—NON-FULFILMENT.—A written contract for building a circus, to be finished and ready for opening on the 11th November 1792, under a penalty of £500, was entered into:—
Held it not a breach of this contract entitling the party to damages, that the circus was not finished for five or six weeks later than the time stipulated.

This was an action raised before the Magistrates of Glasgow, by the respondents against the appellant for payment of the balance due on a building-contract, for building an amphitheatre in Glasgow, to which the appellant stated the defence of breach of contract, in respect that, by the contract, the respondents had become bound, under a penalty of £500, to finish the said building by the term of Martinmas (11th November 1792). That the same was not completed until Christmas following, while great expense, loss, and damage was thereby occasioned to the appellant, from entering

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Nov. 28, 1794. The Sheriff found, "that although it was proved that the respondents were five or six weeks later of finishing the work which they contracted with the defender (appellant), to complete at Martinmas 1792, yet, that he had adduced no proof that the ultimate finishing of the circus was retarded, or that the alleged delay of opening it was owing to the delay of the pursuers in implementing their contract."

This decree being extracted, a suspension was brought to the Court of Session.

May 21, 1795. The Lord Ordinary refused the bill; and, upon reclaiming petition, the Court adhered. And, on further petition, July 6, — they adhered.

Feb. 13, 1796.

Against these interlocutors the present appeal was brought.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors be affirmed: And it is farther ordered, that the appellant do pay, or cause to be paid, to the respondents £100 for costs, in respect of the said appeal.

For Appellant, *Wm. Adam, Tho. M. Donald, H. D. Inglis.*
For Respondents, *Sir J. Scott, Robt. Davidson.*

WM. DINGWALL of Bruckley, Esq.	.	.	<i>Appellant;</i>
JAMES FARQUHARSON of Inverey, Esq.	.	.	<i>Respondent.</i>

House of Lords, 31st May 1797.

SERVITUDE OF PEAT—SERVITUDE OF ROAD.—(1.) The grant or tolerance of a right to take peat, was so worded as in one clause to apply to fifteen fires, while in the other clauses of the deed, it was conceived so as to mean fifteen families, without respect to the number of fires each family might use; the words fifteen families or fires, being apparently used in the sense that each family was counted as one fire, whether they used one or more fires in their houses. Held, that the grant was not limited to fifteen fires in all, but extended to the fire or fires which each family might use, not exceeding the number of fifteen families.

Also, that if the tenants should increase beyond the number of fifteen families, that they had a right to take peat on payment of the sum stipulated. (2d.) The deed also conferred a right of "road" or "way," for carrying their peats from the moss. Held, that this was to be construed to mean a *cart road*, convenient for carrying their peat from the moss, and not a *horse road*, as contended for by the appellant.

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The appellant and respondent's estates lie adjoining to each other, in a part of Aberdeenshire where there is no coal. There was plenty of peat on the appellant's lands of Bruckley, but none on the respondent's lands and estate of Bruxie, which had been acquired, with all the rights and privileges belonging thereto, from a Mr. Keith.

Mr. Keith, the former proprietor of Bruxie, had entered into a contract with the appellant's father, by which the former purchased a privilege or right of drawing peats from the appellant's lands; and it is in regard to the extent to which he had right to this servitude of peat, as well as of a road-way to the peat mosses, that mutual declarators were brought by the parties.

The disposition or grant by the appellant's father was in Mar. 19, 1733. these terms:—"Give, grant, and dispo in favour of William Keith, his heirs and assignees, an heritable and irredeemable moss tolerance, upon the haill mosses of Bruckley and little Auchock, lying within the parish of Auchridie, and sheriffdom of Aberdeen, and belonging heritably to me, the said William Dingwall, for serving and accommodating the town and lands of Over Altrie, Middle Altrie, Nether Altrie, Carndell, Stockbridge, and Brownhill, lying within the parish of Old Deer, and sheriffdom of Aberdeen, and belonging heritably to the said William Keith, and all and every one of them, yearly, in all time coming, with the whole peats which the possessors of the several towns above specified, or any one or more of them, shall happen to have occasion for, within their own families, not exceeding the number of fifteen fires, over and above what is necessary for drying their corns growing on the said town and lands, and after allowing to the said William Keith, and his heirs and successors, the whole peats they shall have occasion for within their own families, under the name of one single fire, hereby authorizing and empowering the said William Keith and his forebears, and their haill tenants and sub-tenants, and possessors of the

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“several lands above mentioned, belonging to the said
 “William Keith, to cast, win, and load as many peats
 “yearly, in all time coming, within the mosses above men-
 “tioned, as shall accommodate their families as above,
 “and to transport and load the same from the mosses above
 “mentioned, to the several lands above specified, by a con-
 “venient road or way, beginning at the burn upon the
 “north end of the town of Broomhill, and going hence
 “through the lands of Little Auchock, to the mosses above
 “specified, set apart, and marked by us, the said William
 “Keith and Mr. William Dingwall, beginning at the north
 “side of William Crichton’s croft, and continuing to the
 “north side of Dubsdale, and going from the said two
 “points, in two straight lines, through the said mosses, to
 “the green ground upon the march of Meikle Auchock,
 “and north side of the said moss; providing, nevertheless,
 “like as it is hereby specially provided and declared, that
 “the above tolerance is granted and accepted with the ex-
 “press provision and condition, that in case the several
 “families upon the lands above mentioned, belonging to
 “the said William Keith, shall happen at any time here-
 “after to exceed the number of fifteen families, then, and
 “in that case, the said William Keith and his foresaids,
 “shall, by their acceptation hereof, be bound and obliged
 “to make yearly payment to me, the said William Ding-
 “wall, and my above written, of the sum of £1. 10s. Scots
 “money, for each of their families or fires above the num-
 “ber of fifteen, which shall happen to be accommodated
 “furth of the moss above specified.”

From the date of this deed of tolerance 1733, till within a few years before the actions were raised, no difference or dispute arose about the terms or construction of it.

Soon, however, after the respondent purchased the estate of Bruxie in 1778, the appellant attempted to restrict the tolerance of taking peat in the above grant, upon the idea that the right was only to the extent of fifteen fires, that is, one fire in each family. He further insisted that the tenants should take the use of a totally different road from that described in the contract, and had dug up ditches to obstruct the use of the old road. He further began to burn part of the moss, and to convert it into corn land, in order to destroy, at least to diminish, the extent of the servitude.

In these circumstances, the present actions of declarator were brought.

The appellant's action concluded to have it found, 1. That it was *optional to him*, to allow the tenants and possessors of the respondent's estate, to cast or carry off any greater quantity of peats than was sufficient to supply fifteen fires, even on payment of the sum stipulated in the tolerance. 2d. That they be prohibited from using any other road than the one described in the tolerance, and that "as a road for horses only."

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The respondent's declarator concluded, 1st. That the respondent and his tenants have a right to carry off whatever quantity of peats they may have occasion for in their families, to the number of fifteen, whether they may happen to have one or more fires in each family. 2d. That they have a title to cast or carry away peats from these mosses, without the consent of the appellant, on paying to him the sum of £1. 10s. Scots annually, for each family, exceeding the number of fifteen. 3d. That the appellant is not entitled to change the respondent's road, or access to the mosses, but that he must keep the road described in the tolerance, open and patent for the use of the respondent and his tenants, and that they have not only a right to it as a foot road, but as a road for horses, carts, and carriages. 4th. That the appellant should be discharged from burning, and otherwise destroying, or admitting strangers to the said mosses, so as to hurt or infringe upon the right of the respondent, in the peaceable and quiet possession of his moss tolerance; and, lastly, that the appellant should be found liable in damages and expenses.

The appellant contended, 1st. By the express words of the contract, the respondent was only entitled to take peats for fifteen fires out of his mosses, without respect to the number of families. It was a tolerance to take peat sufficient for supplying fifteen fires, and no more; for if the meaning of the tolerance had been, that fifteen families, though using ever so many fires, should be entitled to take all the peats from the moss of Bruckley, the clause would have run in different terms, and the possessors of Bruxie would have been entitled to take what peats they had occasion for within their families, not exceeding the number of fifteen families. That the consideration which, by the separate clause of the deed, is stipulated to be paid for additional fires, over and above fifteen, being no more than 2s. 6d. per year, is an additional proof that the word "fires" is to be taken in the natural sense, as an annual

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payment and compensation for as many peats as would supply the consumpt of one fire, but could not be deemed equivalent to the consumpt of a family keeping many fires. And lastly, as to the practice, it was contended, that about sixty years ago, there was not a house on any of the farms of the estate of Bruxie which contained two chimnies, so that it was impossible that any one of the possessors could use more than one fire at the period.

The respondent, on the other hand, contended, 1st. That the appellant's plea rested on a judaical construction of the words made use of in the deed of tolerance, without attending to the senso or meaning in which they were received in the country, and, indeed, made use of by the parties to this transaction. It was evident that the word fire was synonymous with the quantity of fuel consumed by an ordinary tenant, in that part of the country, for domestic purposes. That this was evident from the clause, declaring that the fuel consumed by the proprietor of Bruxie should be considered only as one fire, which it was proper to specify should be the case with regard to the proprietor of the estate, who had probably five or six fires within his house, and consumed five or six times the quantity of fuel an ordinary tenant would have occasion for; but that it was unnecessary to make such a declaration in regard to the tenants, who seldom had occasion to use more than one or two fires, and hence the words families and fires came to be used as synonymous terms. That if any doubt on this head could arise from the first clause in the contract, it was completely removed by the second, in which provision is made for the number of families on the estate of Bruxie exceeding fifteen, and it is declared in that event,—“ That the sum of £1. 10s. Scots shall be payable for each of “ their families or fires, above the number of fifteen, which “ shall happen to be accommodated furth of the mosses “ above specified.” Thus, in the clearest manner, showing that the words “ families” and “ fires” were used in the contract in identically the same sense.

2d point. As to whether it was optional to the appellant to exclude the respondent's tenants, in so far as they should exceed the number of fifteen, from his mosses, even upon the payment of the stipulated sum of £1. 10s. Scots, for each of the additional families or fires? It was contended for the appellant, that the dispositive clause, or that part of the deed of tolerance which contains the grant of the servitude, is only

confined to fuel to supply fifteen fires, and that there was not one word, from beginning to the end of the deed, importing the grant of a servitude of fuel for more fires. So that the original limitation being confined to fuel for fifteen fires, the proprietor of the servient tenement is left free to exercise his option, in regard to a supply of fuel beyond that number. In answer, the respondent contended, that this construction of the grant was totally at variance with the direct terms used. It expressly provided, in the first place, for fire to fifteen families, and, in the second place, and by a separate clause, it provides for a supply of fuel to the respondent's tenants, should they increase beyond, or exceed that number of families. In the latter case, the price or consideration stipulated was fixed at £1. 10s. Scots per annum, besides the price paid for the grant conferred for the accommodation of the respondent's tenants. The grant is as absolute for the number beyond fifteen families, as for the fifteen families themselves; and therefore, it was not left optional to the appellant to admit or disallow fuel to the number beyond fifteen families.

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3d point is, Whether the respondent is entitled to a cart road, for transporting his peats, or if he is limited, as the appellant contends, to a horse road only, for carrying the peats on horses' backs, and in creels or hurdles? The respondent maintains that, on this subject, the deed of tolerance is conclusive. It allows the tenants a liberty to transport their peats "by a convenient *road* or *way*, beginning at the little burn upon the north side of Brownhill, &c., set apart by us, the said William Keith and William Dingwall." In the law of Scotland, which in this particular is borrowed from the Roman law, there are three different servitudes of roads known and established, viz., "Iter, actus, et via. Iter is a right of a horse or foot passage; actus is a right of carriages drawn by men, and of driving cattle; via comprehends the other two, and, besides, includes a right of driving carriages with horses, or other beasts of draught." And Erskine further mentions, that there are servitudes by the usages of Scotland, analogous to these, for foot road, horse road, a cart or coach road. As, therefore, by the words of the grant, the respondent is entitled to a *road* or *way*, there can be no doubt he is entitled to a cart road.

Ersk. B. 2,
Tit. 9, § 12.

The Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having considered the mutual memorials,

Nov. 12, 1793.

1797. " together with the heritable moss tolerance, Finds, that
 ——— " the respondent, Inverey, as proprietor of the estate of
 DINGWALL " Bruxie, is entitled to the privilege of moss upon the mosses
 v. " of Bruckley and Little Auchock, for serving and accom-
 FARQUHARSON. " modating the towns and lands of Over Altrie, Middle
 " Altrie, Nether Altrie, Carndel, Stockbridge, and Brown-
 " hill, with the whole peats which the possessors of these
 " towns, or any of them, shall have occasion for in their
 " families, the same, however, being limited to the number
 " of fifteen fires, besides what is necessary for drying their
 " corns; and reckoning the whole peats which the proprie-
 " tor of Bruxie shall have occasion for in his own family, as
 " one of the said fifteen fires. Finds, that Inverey (respon-
 " dent) and his tenants, in the town and lands above men-
 " tioned, are entitled to a convenient cart road in the direc-
 " tion specified in the said moss tolerance, for transporting
 " their peats from the said mosses to the several lands :
 " Finds, that in case the several families upon the lands above
 " mentioned, shall happen at any time to exceed the number
 " of fifteen, in that case, Inverey (respondent) shall be en-
 " titled to take peats from the said mosses, for the accom-
 " modation of the extra families, but shall be obliged to pay .
 " yearly to the proprietor of the said mosses, the sum of £1.
 " 10s. Scots, for each fire made use of by such of the said fa-
 " milies as exceed the number of fifteen, and decerns." On re-
 June 12, 1794. presentation from both parties, the Lord Ordinary adhered. On
 further representation, his Lordship pronounced this interlocu-
 tor :—" Finds, that by the just construction of the tolerance,
 Dec. 20, ——— " explained by subsequent practice, the privilege of moss
 " therein specified, is granted to the use of fifteen families,
 " and not limited to fifteen fires, and with this alteration
 " adheres to the interlocutor above pronounced. A third
 Jan. 23, 1795. representation was refused. On petition to the whole
 Feb. 28, ——— Court, the Lords adhered to the Lord Ordinary's interlocu-
 Mar. 11, ——— tors. And on further petition, they adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Sir J. Scott, W. Grant.*

For Respondent, *J. Anstruther, Chas. Hay.*

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PATERSONS, & C
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PETER PATERSON, Esq. of Merryflats, and
ARCHIBALD CAMPBELL, Merchant in Green-
ock, surviving trustees, nominated and
appointed by JOHN PATERSON of Castle-
hill, and JOHN, PETER, JAMES, and AG-
NES PATERSONS, children of the said John
Paterson, } *Appellants ;*

JOHN MACCAUL, Merchant in Glasgow,
Trustee upon the Sequestrated estate of
the said John Paterson, and WM. CRAIG
and Others, Creditors of the said John
Paterson, } *Respondents.*

House of Lords, 6th June 1797.

**TRUST DEED—DELIVERY—SIMULATE—REDUCTION OF DEED IN
FRAUDEM CREDITORUM.**—Circumstances in which a trust deed,
granted merely for the purpose of conveying his property to his
children, and distributing it amongst them at the granter's death,
upon which infestment was immediately taken, was held to be re-
ducible at the instance of subsequent creditors upon his bank-
ruptcy, seven years thereafter, though not challenged under the
statutes, but at common law.

John Paterson of Castlehill, of this date, executed a April 24, 1786.
trust deed in favour of the appellants, upon the narrative,
“ That the children of the marriage procreated, and ex-
“ isting between me and the deceased Mary Sommerville,
“ my spouse, are still unprovided for by me, in a sufficient
“ share of my estate, to which they have good right, from
“ the subjects I have received belonging to their mother,
“ and that it is my intention that those children should be
“ suitably provided out of my estate.” Therefore he
disponed to the appellants, as trustees and fiduciaries “ for
“ the use and behoof of John, William, Peter, James, and
“ Agnes Patersons, my children lawfully procreated be-
“ tween me and the *deceased* Mary Sommerville, all and
“ hail that piece of land called Castlehill,” and certain
other lands therein enumerated.

The reservations and purposes of the trust were thus de-
clared :—“ Reserving always my liferent of the subjects
“ above disponed. But these presents are granted for the

1797. " ends and purposes after specified, namely, that the trus-
 ————— " tees shall, after my death, dispone and convey to my
 PATERSONS, " eldest son, his heirs and assignees whomsoever, and in
 &c. " case of his death without lawful issue, to my eldest son
 n. " then existing, his heirs and assignees, the lands of Castle-
 MACCAUL, &c. " hill." He then directed his trustees to sell and dispose of
 " all his other heritable subjects above disposed by public
 " or private sale, and to divide the proceeds of the same
 " equally among my whole children, which shall be existing
 " at the time of my death."

The deed contained an obligation to infest, and a procuratory of resignation and precept of sasine in common form, and the appellants were infest upon it accordingly.

John Paterson of Castlehill, thereafter became bankrupt, Dec. 17, 1793. and was sequestrated of this date, and the respondent MacCaul, was appointed trustee on his bankrupt estate.

The present action was a reduction brought by the respondents, to set aside and reduce the above deed, on the following grounds:—1st. That the conveyance was a simulate deed, not expressing the real views and intentions of the grantor, but intended merely as a pretence to enable him to settle upon more favourable terms with Agnes King, a woman who pretended to be his wife. 2d. That the trust conveyance for behoof of the children was never legally delivered, and the infestments taken thereon were improperly and surreptitiously taken, without the authority or knowledge of the grantor. 3d. That the deed, supposing it to have been legally delivered, and seriously intended to convey what it expresses, was an alienation in *fraudem creditorum*.

In defence to this action, it was answered:—1st. That there was no legal evidence on the face of the deed itself, to show that it was a simulate deed, and merely to affect the claims of Agnes King upon him, 1st, because it did not convey the whole estate. It reserved it entire to himself in liferent; and, 2d, because if Agnes King made good her claim of being his wife, the infestment taken would, in that case, not defeat her terce or dower, because she would be entitled to her terce upon all lands in which John Paterson was infest, previous to granting that deed. 2d. In the next place, the deed was a properly delivered deed, given and left in the hands of John Maxwell, writer, Glasgow, who was agent as well of the grantor as of the grantees, and where the deed is in the hands of one who is the agent for

both, it is presumed to have been delivered for behoof of the grantees. In the second place, it is impossible to say that a deed has not been delivered, on which sasine has been given, and the instrument of sasine duly recorded. Further, the consent of John Paterson was not necessary to this infeftment, as that was conclusive from his leaving it in the hands of the grantee's agent, with the usual clauses for infeftment. 3. The deed was not granted to the prejudice of prior creditors, for the grantor then owed no debts, or if he did, they have been all since paid, and the debts of the creditors who now reduce this deed, were contracted five or six years after its date; neither was it granted in contemplation of bankruptcy, for the deed is dated in 1786, and the bankruptcy took place in 1793. At the time the deed was granted, John Paterson was perfectly solvent.

The case of *Street v. Mason*, founded on by the respondents, instead of being against, is in favour of the appellant, as showing that the deed is not impeachable as in *fraudem creditorum*.

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The Lord Ordinary, of this date, pronounced this interlocutor:—"Reduce, decern, and declare, in terms of the libel." And, on representation, his Lordship adhered. And on petition to the whole Lords, the Court adhered to the interlocutor of the Lord Ordinary.*

Stair's Decisions, July 2, 1673; Reed v. Reed, Dec. 4, 1673.
Jan. 26, 1796.
Feb. 4, —
Feb. 26, —
Nov. 15, —

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1st. The deed was not simulate in any one degree, except as to Agnes King, and therefore must receive effect to every other purpose, and in particular, as regards the respondents, who challenge it. 2d. Because there is every legal presumption of the deed having been delivered, both from the general rule of law in regard to deeds executed according to the form of law of Scotland, which throws it upon the respondents to show that it was not delivered, but which they have not done; and also from the fact of its having been deposited with a person who was agent both for the grantor as well as the grantees; in which case, the presumption is, that it is delivered to him as agent for the grantees. And what makes

* Opinions of Judges :—

LORD PRESIDENT CAMPBELL.—"This was evidently a *mortis causa* deed, and cannot be sustained against creditors. *Vide* Dictionary, voce "Fraud," case of *Stewart v. Mason*. Mr. Paterson showed his own sense

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this delivery more conclusive, is, that sasine was taken upon the conveyance, and the instrument duly recorded, which precludes the possibility of saying that the deed was not a delivered deed. Whether the infeftment was taken with or without the consent of the grantor, makes no difference, for he had bound himself in the deed to give sasine, by granting his authority to that effect. 3d. The deed, further, was not granted in defraud of prior creditors, nor granted in contemplation of bankruptcy, nor has any special act of fraud been stated or proved, to support such a ground; and yet, upon the authority of the cases upon which the respondents have relied, fraud must both be stated and proved.

Muirhead of
Bradisholm
and her Son v.
Muirhead,
Fountainhalls,
Dec. 26, 1686.
Ross v. Mac-
kenzie, affirm-
ed in the
House of
Lords, 29th
April, 1776.
App. to this
vol.

Pleaded for the Respondents.—1st. The trust deed was a simulate deed, not expressing the real object and intention of the grantor, but intended merely as a pretence, to enable him to settle upon more favourable terms with Agnes King, or at least was not intended to be effectual, unless he prevailed on her claims. Had she prevailed in making good her claim, she would have been entitled to a share in his estate, and this deed was granted to disappoint that object. The deeds executed by persons about to engage in rebellion, conveying their estates to their next heirs, to save forfeitures, have always been reduced as simulate, or not meant to take effect, unless the forfeiture took place. Here the risk wished to be avoided never took place, because Agnes King's claim was finally settled and bought off, leaving rights to stand as before this deed was executed. 2d. The trust-deed was never legally delivered, and consequently cannot be effectual to the grantees or donees. 3d. The trust-deed was farther reducible, as being *in frau-*

of the matter, by cutting his name from the disposition. The deed, besides, was executed for a particular purpose, and *not a fair one* at the time. When that object ceased, the trustees wished to make another use of it, which was equally unfair. I am for refusing the prayer of the petition."—"I adhere to the former interlocutor."

LORD JUSTICE CLERK.—"I am for adhering. This is an unilateral deed, and no other was meant to have a *jus quesitum* in it. It was put into the hands of his own doer, who had no authority to take infeftment *for delivery*, but only *for making it a real right*. The deed remained still in his own power."

LORD POLKEMMET.—"Of same opinion."

Vide President Campbell's Session Papers, vol. lxxxiii.

dem creditorum; and gratuitous alienations of this kind, it will not be disputed, may be set aside by creditors whose debts were contracted previous to such alienations, if they have been made with a fraudulent design. The design here was fraudulent, because, when the bankrupt executed this deed, he had no personal funds, and he could not be allowed to lock up his property, and at same time embark in trade, without making the design apparent. Mr. Paterson was trusted by his creditors, on the faith that his estate was still his, and not conveyed away to his children; and, therefore, although the conveyance may not be reducible upon any of the statutes, it is reducible at common law, which upon this point is founded on the most obvious principles of justice. *Stair's Decisions*, Street and Jackson *v.* Mason, 2d July 1763; *Reed v. Reed*, 4th December 1673.

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After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Sir J. Scott, M. Nolan.*

For Respondents, *Wm. Adam, John Clerk.*

[From the Court of Exchequer in Scotland.]

In Error by Bill of Exceptions.

JAMES EDGAR, DAVID REID, ROBERT HEPBURN, and JOHN HENRY COCH- RANE, Commissioners of Customs in Scotland,	}	<i>Plaintiffs in Error;</i>
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DONALD MILLER and BENJAMIN MILLER, *Defendants in Error.*

House of Lords, 9th June 1797.

BRITISH HERRING FISHERY—KING'S BOUNTY—ACT 26 GEO. III.

c. 81.—The act of Parliament above quoted confers a bounty of 20s. per ton on all decked vessels, called busses, engaged in the herring fisheries in Scotland. Circumstances in which the mode of fishing practised by the defendants in error, did not entitle them to claim such bounty.

Two modes of prosecuting the herring fishery in Scotland are recognized by acts of Parliament. The one by means of boat, called the boat fishery; the other, by means of larger

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vessels, called buss fishery. The former is prosecuted by the fishers on the several fishing stations, when the shoals of herring appear on their coast, and in open boat, the fishers bringing the fish to land, and there salting and curing them in barrels. The buss fishery is that which is followed by means of *decked* vessels, having on board barrels and salt to cure the fish when caught, and a proper equipment of men and provisions for a long voyage of considerable endurance, visiting the remoter fishing grounds, and remaining away for a whole season for that purpose.

For the encouragement of the latter mode of fishing, several acts of Parliament had passed, offering bounties of so much per ton of the vessel's tonnage, for the promotion of the objects thereof, as well as to promote a numerous body of able seamen for the defence of the country.

The act on which the present question arises, the act 26 Geo. III. c. 81, fixes the rate of bounty at 20s. per ton.

In this situation of the law, sometime before 1793, certain fish-curers in the north of Scotland formed a plan of prosecuting the fishery, which, it was alleged, was a mere device formed to obtain the bounties granted to the buss fishery. It appears that these fishers imagined that nothing was wanted to convert their boat fishery into a buss fishery, but the addition of a decked vessel or buss. They accordingly procured a decked vessel. Barrels, salt, nets, and provisions, were put on board. A number of men appeared, calling themselves her crew; and a license from the principal officers of Customs was granted for the vessel to *proceed upon her voyage*. Instead of proceeding on her voyage, however, the barrels, salt, nets, and provisions, were all taken out of the buss, and the men employed themselves in fishing in their open boats. The herrings caught were landed, salted, and packed *on shore*, while the empty buss or decked vessel lay fast at her moorings, without proceeding from the spot.

The defendants in error, merchants in Staxigo, Thurso, were among the number who practised this mode of fishing, and when they applied to the Commissioners of Customs for the government bounty it was refused, whereupon they brought an action upon the case in the Court of Exchequer, for payment of these bounties, proceeding upon the narrative in the declaration, that they had complied with the requisites of the said act, and that their buss or vessel had, between 1st June and 1st October, in the year 1794, cleared

out of the port of Thurso, and proceeded upon the said fishing, and did then begin and continue to fish, and did there catch and take a full cargo of fish, and did return therewith to the port of Thurso, &c.

To this declaration the plaintiff in error, pleaded the general issue; and the cause coming to be tried, a verdict pursuant to the opinion and direction of the Court was found for the defendants in error for £84. 9s. 3d.

In the course of the cause, a bill of exceptions to the opinion of the Court was tendered.

Judgment having been given for the defendants in error, the plaintiffs brought the present writ of error.

Pleaded for the Plaintiffs.—It is incumbent on persons claiming a bounty, to show that they have faithfully, unequivocally, and strictly complied with the conditions upon which the bounty is given. The evidence in this case does not prove a compliance, in point of law, with the conditions prescribed by the act of Parliament, upon which the action is founded, either according to the words or the spirit of that act. First, as to the words of the act, it is declared, that the decked buss or vessel shall *clear out of some port*, and shall *proceed* immediately upon the said fishery, and shall there begin and continue to fish for the space of three months, unless such vessel shall, within that space, *return* into port with a full cargo. By the 3d section of the act, no person shall be entitled to the bounty for any buss or vessel which shall not *proceed* directly upon the said fishery, *from* that part of the United Kingdom to which such buss or vessel shall belong, and the masters and owners shall take out a license to *proceed* on her intended *voyage*. The words also, shall *continue at sea* for three months clear, demonstrate that the bounty was only intended to such vessels as would leave their own ports, and fish in remote coasts or fishing grounds. As to the spirit of the act, it is equally clear, that the object of the act manifestly was to encourage shipping and navigation, and for breeding up a race of hardy seamen; and such object could only be attained by means of these vessels proceeding to sea, not by keeping them moored in port, but by going to sea in vessels, and with a due equipment of able seamen, so as to enable them to make, not only considerable voyages, but also to continue at sea for some time. A mere boat fishery is plainly inadequate to this end; and it is for this reason the buss fishery has had conferred upon it the bounty in question.

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Pleaded for the Defendants.—It is admitted by the plaintiffs in error that the defendants' vessel did clear out of the port of Thurso for the said fishery, by taking and receiving from the Custom House the necessary papers for that purpose. It also appears from the evidence in the bill of exceptions, that the said buss or vessel did proceed immediately upon the said fishery, by sending her boats and crew with her nets to fish, which is the invariable mode of fishing for herrings upon all the coasts of Scotland, the busses in the meantime lying in harbours, a-ground or afloat, as circumstances may require or admit; and, on the coast of Caithness, which is extremely dangerous, busses cannot fish in any other way. That this practice was agreeable to the words and spirit of the act, and as such, was repeatedly sanctioned by the plaintiffs in error, and the different officers of customs acting under them. Indeed, on the present occasion, when they took out license as formerly, they had not the most distant hint that they were expected to follow a different mode of fishing from that which had been repeatedly sanctioned by the plaintiffs in error.

After hearing counsel, to argue the errors assigned in this cause, the following question was put to the Judges :

Whether, upon the matter stated in the record, the plaintiff (defendant in error) hath shown that he had a good cause of action, to recover the bounty of 20s. per ton given by the statute made in the 26th year of His Majesty's reign, for the more effectual encouragement of the British fisheries?

Whereupon

THE LORD CHIEF BARON of the Court of Exchequer having conferred with the rest of the Judges present upon the said question, delivered their unanimous opinion in the negative.

It was then

Ordered and adjudged that the judgment given in the Court of Exchequer in Scotland be, and the same is hereby reversed.

For Plaintiffs in Error, *Sir J. Scott, R. Dundas, J. Mitford.*

For Defendants in Error, *Wm. Grant, Wm. Adam.*

<p>THE GOVERNOR and COMPANY of UNDERTAK- ERS for Raising Thames Water in York- Buildings,</p> <p>ALEXANDER MACKENZIE, W.S.,</p>	<p style="font-size: 3em;">}</p>	<p><i>Appellants ;</i></p> <p><i>Respondent.</i></p>	<p>1797.</p> <hr style="width: 50%; margin: 0 auto;"/> <p>YORK BUILD- INGS CO. v. MACKENZIE.</p>
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House of Lords, 14th June 1797.

REDUCTION OF SALE OF ESTATE—INTEREST UPON RENTS—DEDUCTIONS FOR IMPROVEMENTS—EXPENSES—DAMAGES—MALA FIDE POSSESSOR.—In the question of adjusting accounts between the appellants and respondent, under the judgment of the House of Lords, the respondent, before reconveying the estate of Seton, was held entitled to claim, 1. Expenses of making up his titles. 2. The expense of planting shrubbery and trees. 3. Expense of building the mansion-house, and the house and office at Port-Seton, as items expended beneficially for the estate. But held that Mr. Mackenzie was not liable in the expenses of the reduction incurred to the appellants in the circumstances of this case—the Court below having exonerated him of all fraud in the transaction, and decided in his favour as to costs of the proof.

This was a resume of the case between the appellants and respondent, (reported, *ante* p. 378).

After the judgment in the House of Lords, the respondent appealed, by petition to the Court of Session, to have the judgment applied, and produced, along with the judgment, a state of all the accounts he conceived to be necessary for adjusting the balance. In the accounts so exhibited, the respondent, besides the purchase money and interest, charged the appellants with the following articles:—

1. The expense of completing his titles to the estate of Seton.
2. The expense of boring and sinking for coal.
3. The expense of building a house and offices at Port-Seton.
4. The expense of erecting a mansion-house on the estate, and offices ; and,
5. The expense of improving and dressing a part of the grounds contiguous to the mansion-house, and planting trees and shrubs.

And as the judgment of the House of Lords directed interest to be computed on the rents and profits which the respondent had received, he stated, in his said petition, that

1797. the stipulated terms for payment of the rents were such, that the last, and a large portion of each year's rent, was payable only at Lammas, (*i.e.* 2d of August), of the following year; that is, of the rent of the year 1779, the last part was payable at Lammas 1780, and so forth. The respondent suggested to the Court that each year's rent should be held to have been on hand at Martinmas (11th November) of the subsequent year, and that five per cent. interest should be charged on both sides of the account.

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The respondent farther submitted to the Court, that he was entitled to a commission as factor-fee for receiving the rents which he was thus going to account for, in the same way that the appellants' steward would have done.

14th and 18th Nov. 1795. The Court pronounced this interlocutor:—"Find that Mr. M'Kenzie must be liable to account for the rents at the term of Martinmas following the terms of payment respectively, and repelled the objection to the same: Sustain the objection of the appellants to Mr. M'Kenzie's charging factor-fee for levying the rents and managing the estate: Find Mr. M'Kenzie entitled to charge the expense of making up his titles to the estate, and repel the objection thereto; and ordain Mr. M'Kenzie to give in *quam pri-mum*, a minute or condescendence, with respect to the 4th, 5th, 6th, and 7th articles objected to by the Company, and therein to state what he offers to prove concerning them."

12th and 18th Dec. 1795. The appellants reclaimed against this interlocutor, in so far as it allowed the expense of making titles, but the Court adhered.

Dec. 12, 1795. The respondent having given in his condescendence, and considering which and answers, the Court pronounced this interlocutor: "Nominate and appoint George Steele, overseer of the late Sir Archibald Hope's coal-works, to examine the boring and sinking for coal in the lands and estate of Seton, made by Mr. Mackenzie, with the depth and lie of the metals, and whether or not it had been properly executed, and for the benefit of the estate, and to report upon oath, with power to the said George Steele to take such information as may enable him to form his opinion. And with respect to the mansion-house of Seton and the shrubbery, before answer, allow a proof to both parties of the value thereof, and how far they are to be considered permanent benefits to the estate: And also of the house at Port-Seton."

The respondent presented another petition, stating that, although, by the terms of the judgment of the House of Lords, he was entitled to retain possession of the estate till the accounts between the parties should be settled, at which period he was directed to divest himself, yet as he had no wish to retain possession, and was ready to divest himself thereof, provided his preferable claim to the rents, as well as to the property, in satisfaction of his claims, was reserved; and therefore praying the Court to sequester the estate of Seton, and appoint a judicial factor.

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Whereupon the Court pronounced an interlocutor, appointing Mr. Archibald Swinton, W. S., judicial factor upon the estate of Seton. Dec. 19, 1795.

The report in regard to the expense of sinking for coal, and the value of the mansion-house, &c. the Court pronounced this interlocutor: "Repel the charge made by Mr. Mackenzie for the expense of boring and sinking the coal, but sustain the claim made for the expense laid out in inclosing and making plantations, and a shrubbery adjacent to the mansion-house; also for the money laid out in building the house at Port-Seton, and the mansion-house of Seton and offices: Find him entitled to the full amount of these outlays, and remitted to Mr. Bremner accountant to adjust the accounts betwixt the parties upon the data of this interlocutor." 11th and 15th June 1796.

The accountant having reported that there was due to the respondent as at Martinmas 1796, the sum of £26,017. 4s. 10 $\frac{4}{5}$ d.

Objections having been given in to this report, a further sum of £47. 7s. 4d. was added to the sum due to the respondent. Petitions having been presented by both parties, that from the respondent craving the Court to hold the estate to be irredeemable unless the appellants paid the sum found due to him on a precise day; but the Court adhered, of these dates. Dec. 17, 1796. 14th and 15th Dec. 1796.

Against these interlocutors the present appeal was brought to the House of Lords; 1st. Against the mode fixed by the Court of calculating the interest of the rents received. 2d. Against the respondent's claim for the expense of making up his titles. 3d. Against the expense of making the shrubberies and the building of two houses, in respect that these were not laid out for permanent benefit and improvement of the estate. 4th. As to the appellants' claim for damages on account of the different leases granted by the defender

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on the estate. 5th. Against sequestrating the estate of Seton and appointing a judicial factor; and, 6th. As to the expenses in the Court below.

Pleaded for the Appellants.—1. In regard to the interest on the rents, this ought to have been calculated from the dates on which these rents were received, and not from an arbitrary period fixed by the Court long after the term of payment. 2. The charge for completing the titles was a bad charge, and ought not to be allowed, the more especially as your Lordships, in the former case, had ordered the estates to be reconveyed without any reservation or deduction of this kind. 3. and 4. These charges for the houses built, and shrubberies, &c. are not accurate; and your Lordships' judgment only allowed such deductions as are actually *laid out for the permanent improvement of the said estate*, which these buildings in any sense cannot be considered to be. 5. The sequestration of the estate and rents was totally in direct contradiction to your Lordships' judgment, which ordered the estate of Seton to be reconveyed to the appellants. Besides, the estate was not bankrupt, and there was no necessity for this step. 6. and 7. In regard to the damages for the leases and the expenses of process, and the whole deductions for buildings and planting, &c. the original transaction being unfair, Mr. Mackenzie was not entitled to claim these. Your Lordships found that he was *in pessima fide* in taking the advantage he did, and so therefore cannot be held in law to such redress.

Pleaded by the Respondent.—1. The interest of the rents was properly calculated, and upon a principle to give the appellants the utmost advantage, and to avoid complexity and confusion, which would have resulted from calculating it in any other way. 2. The charge for completing the respondent's titles was usefully expended, and *in rem versam* of the appellants. 3. The expenses of the buildings and other improvements was decided by your Lordships in the previous appeal, which the appellants are not entitled to question. 4. It was quite competent and proper, in the circumstances, to sequester the estate, seeing that Mr. Mackenzie had refused to act, and resigned his office of common agent. 5. In regard to the costs, there was good ground, or at least a *probabilis causa litigandi* in defending the reduction. The respondent had two judgments of the Court in his favour, and the last interlocutor expressly found him entitled to the expenses of the proof led, though

not to any other expense. He ought therefore not to be held liable in costs. In regard to the damages for the losses, the same judgment below found him exempt from the charge of fraud. Your Lordships also did not impute fraud, or hold that the acquisition was void *ab initio*, otherwise the maxim *resoluto jure dantis resolvitur jus accipientis* would have applied. Therefore, as every contract made *bona fide* with him, as proprietor of the estate, is declared to stand, upon the same principle every contract he made with others respecting the estates *bona fide*, and in the usual manner, must stand good; and there having been a *probabilis causa litigandi*, he ought therefore not to be found liable in damages. And in respect to the whole objections, the long possession, together with the *bona fides* of the respondent, ought to be held a sufficient answer, and ought also to entitle him to pray, as he did, that unless the appellants paid the balance found due to him by a certain day, the estate ought to be held irredeemably in his possession.

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LORD CHANCELLOR LOUGHBOROUGH said :—

“ My Lords,

“ I do not at present rise for the purpose of moving your Lordships to reverse the interlocutors appealed from in the present case.

“ In the original question which came before this House, between the same parties, many different opinions might have been formed; the interlocutors of the Court had varied, and it was a matter of delicacy, and deserving of much consideration. The habits of the Court, in cases of a similar nature, the competency of a common agent to purchase, the situation of Mr. Mackenzie, and the conduct of the York Buildings Co., taken altogether, involved a nice case, and one of considerable difficulty.

“ The judgment of this House upon it is amply stated; it is distinct, and careful of the interests of either party. I declared my opinion at the time, that it would put a stop to future litigation on the subject; but I have been a false prophet, as the large bundle of printed papers in the subsequent litigation now before me sufficiently testifies.

“ There are a number of different points taken up by the appellants in the present appeal. But there is an exception taken to a rule adopted by the Court, in their interlocutor of 14th November 1795, with regard to charging interest for the rents received by Mr. Mackenzie at the term of Martinmas following the terms of payment of the same. But as to this point the interlocutor was fully acquiesced in by the appellants, they specifically reclaimed against another part of that interlocutor, but not against *that* now in question. It is

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true, the rule adopted by the Court with regard to the terms of Martinmas was taken up arbitrarily, and was not according to the terms of the judgment of this House. It is a fact well known, however, that, in that part of the country, the rent of the year 1796 is not payable till 1797, the year after; and the rent even then payable at four different terms. I am afraid, too, that in Scotland as well as perhaps in this country, the rent is not always paid when it becomes payable. To have gone with accuracy into every term's rent would have been extremely difficult. The Court therefore arbitrarily go into one term. As this was different from the directions of the judgment of this House, if it had not been acquiesced in by the parties, I should have found some difficulty in departing from that judgment.

“ Afterwards, the matter went to an accountant, on the footing of this interlocutor, with a long account of Dr. and Cr. And accordingly the accountant made up his report, without previous objection by the appellants. In a court of equity in this country, in the Court of Chancery, if an account was referred to a Master to be made up in a certain form, the mode of accounting must be objected to before the account is made up, and cannot be done afterwards.

“ 2d. The appellants make an objection to a sum of £79, claimed by the respondent for making up his title to the estate. A considerable part of that expense will not be needed again. Whoever makes up a title in future, it will not be necessary to take it up by decree of the Court. But a complete answer to this objection is, that at the time of Mr. Mackenzie's purchasing, there was no objection taken to him, and he was under a necessity of making up a title. Perhaps by application to the Court he might have removed tenants, but there were many other things to be done. In the then condition of the estate, it was very inconveniently divided; part of it lay in runridge and in links, part of it was possessed by rentallers, who have a sort of permanent interest. He must have made up titles to new model these parts of the estate; and he could not otherwise have settled with those possessors. The first step was to make up a legal title, and, in so doing, he acted for the advantage of the estate. That expense was particularly beneficial.

“ 3d. The appellants take exception to the sums allowed to Mr. Mackenzie for building the mansion-house and the house at Seton, and for making the plantations on the estate. It would be singular indeed if these were to be deemed no permanent improvement. It is not according to the fancy of the owner or of the builder, that the improvement upon the estate is to be estimated; but it cannot be said, that these are no improvements. The only question is the *quantum*. The questions put to the witnesses on this subject seem to have been uncommonly idle, (here his Lordship read some of those put to the surveyor.) If it had been referred to a jury, the

proper question would have been, whether or not the buildings were proper for the estate ?

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“ Before Mr. Mackenzie thought of building, he had been undoubted proprietor of the estate for several years, and which he thought his own. The surveyors also estimate the value of the erection to be more than what was paid for them. But whether the house would weigh more in the sale of the estate than the expense of the erection; Or, if it was sold separately, what price it would bring, are mere matter of speculation. If the house was proper for the estate, no other mode could be taken than what the Court has adopted in the present case.

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“ In judicial sales in Scotland, it is always the practice to put a specific value on a mansion-house. In a case lately before your Lordships, a house was valued (Culross Abbey) at so much per square yard, or so much per cubic foot.

Vide Ante
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“ The other articles in the present appeal are consequential upon the dispute.

Bushby and
others, p.528.

“ The appellants claim their costs in the former action of reduction : but that cause was twice determined in the Court below in Mr. Mackenzie's favour ; and when the Court were against him in one interlocutor they still decided in his favour as to costs. It was extravagant to suppose they were going to give costs against a party whose claims they had twice sustained.

“ They claim damages on account of the leases let by the respondent, but their demand upon this point is totally wild and groundless. These leases are let for a prodigious rent, and very much for the advantage of the Company. When the appellant entered into the possession the yearly rent amounted to , and when he left it, the rent had increased to upwards of £1300.

“ The Company also appeal against an interlocutor pronounced by the Court, refusing a petition of Mr. Mackenzie *in hoc statu*, which prayed to have his claims paid against a certain day, or that the estate should otherwise be adjudged to belong to him. It does not appear to me that the Company had any reason to appeal from this interlocutor, whatever reason Mr. Mackenzie might have. They, however, have thought proper to add this to the other items of their appeal.

“ To conclude, there appears to have been so much perverse litigation in this business, that it will be a proper example to affirm the interlocutors with some costs against the Company. If the appeal had been singly with regard to the erections and improvements, I would have given no costs ; that was a fair point for litigation : I therefore do not think proper to go to the full extent of your powers on this occasion ; but I shall move that the interlocutors be affirmed with £100 costs.”

Accordingly, it was

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Ordered and adjudged that the interlocutors complained of be affirmed, with £100 costs.

For the Appellants, *R. Dundas, J. Mansfield, John Clerk.*

For the Respondent, *Sir John Scott, Wm. Tait.*

THE GOVERNOR & COMPANY of Undertakers
for Raising the Thames Water in York } *Appellants;*
Buildings, - - -

JAMES BREMNER, Writer to the Signet in
Edinburgh, Common Agent in the sale of
the York Buildings Company, JAMES } *Respondents*
FORBES, the Heirs of the Rev. Dr. Fordyce,
and THOMAS PLASKETT, - -

House of Lords, 19th June 1797.

This was a petition and complaint for the removal of a common agent, in the following circumstances, and also against the judicial sale ordered by the Court, of the estates of Seton.

The York Buildings Company's estates became the subject of a ranking and sale; and afterwards an act of parliament was passed for selling off the estates, and otherwise winding up the concern. This act gave power, without waiting the conclusion of the ranking of the creditors, to sell the whole lands belonging to the Company in Scotland, at the suit and application of any party having interest, empowering the Court of Session to give decree of sale in favour of the purchasers, in the same manner, and under the same laws and regulations respecting the sale of bankrupt estates.

It was alleged by the appellants, that in consequence of these sales, a fund arose which greatly exceeded their debts; but, in consequence of the irregularity and mismanagement of the common agents on the estates, this fund, which, after paying their creditors in full, would have left a reversion of £10,000 for them to receive, had been entirely wasted and consumed.

It was further stated, that Mr. Mackenzie had been at first appointed common agent; but, upon his purchase of part of the estates of the Company, and the proceedings

consequent thereon, to reduce the sale, he resigned his office of common agent, and Mr. Scott, W. S. was thereupon appointed in his place.

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It was further stated, that by the judgment in the House of Lords in the case with Mr. Mackenzie, the sale to him was not only set aside, but it was also ordered, that Mr. Mackenzie, on receiving payment of what was due to him for his reimbursements, was to reconvey the estates to the *Company*, subject to the several claims of the creditors still remaining unpaid. But in place of giving effect to this judgment of the House of Lords, the Court of Session, in the remit made to them, ordered the estate to be sold under a bankruptcy. In particular, on petition of Mr. Mackenzie, stating that he would no longer continue the management of the estate, and praying the Court to sequester the same and appoint a factor, Mr. Bremner appeared, and adopted this petition, and also separately petitioned the Court to sequester.

The Court, of this date, sequestered the estates of Seton accordingly, and continued Mr. Archibald Swinton, W. S. factor on the sequestered estates of Seton.

The Court thereafter “found it proven that the present rental of the whole lands, teinds, and other subjects under sale, amounts to £1326. 12s. 2 $\frac{4}{12}$ d. Sterling, deducting £10. 7s. 11 $\frac{4}{12}$ d. of public burdens, which falls to be deducted from the said rental. Find that the value thereof, and of the house at Port-Seton, according to the several rents mentioned, on the said first view would extend to the sum of £37,963. 13s. 10d. Find that the common debtors are bankrupt, and their creditors in possession of their estates: Find it proven, that on the supposition that the leases, (excepting Thorntree Mains), expire in a short time, the said lands might yield a gross rental of £1876. 6s. 4d. &c.; and ordain the lands to be exposed by public roup, in one lot, at the upset price of £47,000, on the day of next to come.” On reclaiming petition the Court adhered.

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It was farther stated, that on the resignation of Mr. Mackenzie as common agent, the Court, sensible of the right the appellants had, did, on petition presented to them, recognise the Company's right and interest in the management of the estates of Seton, and had pronounced this interlocutor: “In respect of the particular circumstances of this case, found that the creditors have no right to name the common agent, but that the right is in the Company, and

5th and 11th
March 1789.

1797. "appointed them against Tuesday next to appoint a person." The appellants thereafter having recommended Mr. Scott, W. S. the Court, upon the 11th March 1789, nominated and appointed him to be common agent. But the above interlocutor of 5th March, finding the right in the Company to name the common agent, was afterwards corrected when, on the resignation of Mr. Scott in 1791, the Company named Mr. Bremner as Mr. Scott's successor. By an interlocutor of March 1792, the Court, recurring back to the above interlocutor, and stating it to have been worded in mistake, held that the appointment of the common agent in this case was in the Court, and that Mr. Bremner derived his appointment from the Court alone. The appellants further stated, that this latter judgment was erroneous—that there was no pending ranking and sale—that by the ranking and sale that formerly was in pendance, their estates had been sold at immense undervalues, and that as the House of Lords had authorized these estates of Seton to be conveyed to them, they had an interest to prevent such proceedings again, and therefore that judicial sale ordered by the Court was incompetent.

The petition and complaint, besides alleging these irregularities, alleged further irregularities against Mr. Bremner, the present common agent, in so far as the estate was seriously injured, and the funds wasted, by his proceedings. In particular, it was alleged that Mr. Bremner had given in states of the claims to the Court, magnifying greatly the amount of the debts against the estate beyond the real amount, so as to give an appearance of bankruptcy, and praying to have him removed from the office of common agent, and to appoint another, to be named by the petitioners. It farther prayed the Court to delay the sale of the Seton estates advertised by Mr. Bremner.

Dec. 2, 1796. Pending the discussion, the Court adjourned the sale in Dec. 15, — the meantime. In the course of this discussion the appellants contended, 1st. That the act 17th of his Majesty above mentioned does not, under the circumstances of the case, authorize the Court to proceed in the sale of Seton. 2d. That there was no proper or regular process of ranking and sale in dependence, in which it is competent *hoc statu* to insist in the sale of Seton; and, 3d. That Mr. Bremner ought, in the circumstances, to be removed from his office. Mr. Bremner gave in replies, along with three other creditors who concurred with him, contending for the contrary of these propositions.

Thereupon the Court pronounced this interlocutor:—
 “ Remit to this week’s Ordinary on the Bills to adjourn the
 “ roup and sale of the first and second lots of the lands and
 “ barony of Seton, till Thursday the 16th day of February
 “ next, and appoint the same to proceed on that day:
 “ Find the charges exhibited against the common agent
 “ groundless and injurious; therefore find the York Build-
 “ ings Company liable in the expenses of this part of the
 “ litigation; and appoint an account thereof to be given
 “ into Court; and refuse the desire of the petition, replies,
 “ and minute, *quoad ultra*.”

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Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—That the whole proceedings in the ranking and sale following the judgment of the House of Lords in the case with M’Kenzie were irregular and incompetent, because the House of Lords having set aside the sale in the manner expressed in the judgment, and having thereby ordered and adjudged that Mr. Mackenzie do, on receiving payment of what was due to him, *reconvey* he estates of Seton to the appellants, the *York Buildings Company*, subject to the demands of their creditors then unpaid; and having also remitted the cause back to the Court of Session, that the said Court might “ *give all necessary and proper directions for carrying the judgment into execution* ;” the meaning of the said judgment and remit by the House of Lords was so express as totally to exclude all construction and interpretation. But by the proceedings adopted under the remit above set forth, the Court of Session have now made it impracticable for Mr. Mackenzie to grant the conveyance directed to be executed by him, and have also thrown insuperable difficulties in the way of settling with him his embursements, which is the condition only upon which he is ordered to reconvey the estate. This has been brought about by the Court of Session ordering the estates to be sold by a form of process unknown in the law of Scotland, and by which the purchaser cannot have a good title, although he may attain possession of the estate, and hold the price at the same time. The consequence of which necessarily is, to involve the appellants in an useless and expensive litigation, by which the reversion of the price is swallowed up, or the right to such reversion lost altogether.

It was further incompetent for the Court of Session to pro-

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ceed in selling these estates as they did under the act 1777, because this act was long since at an end, and of no force; by the selling of these estates of Seton to Mr. Mackenzie, and with the price paying all the remaining creditors of the Company their debts, the purposes of the act were at an end, and the Company had only to receive the reversion, the present creditors, or pretended creditors, Messrs. For- dyce and Plaskett, having no claim whatever on the Com- pany. The act of Parliament was passed to facilitate the payment of the creditors. So soon, therefore, as these were all discharged, the act necessarily fell to the ground, and was at end; and, therefore, the estate of Seton, when sold the second time, cannot be considered as sold under the act of Parliament. But even supposing it was still subsisting, the act of Parliament does not authorise the Lords of Ses- sion to sell the Company's estates except at the suit of "*persons having interest.*" But as there are no persons having a legal interest, and as the present pretended credi- tors have none, there was no authority whatever for the sale. Besides, the title was in Mr. Mackenzie, and not in the York Buildings Company, and therefore it was not at the moment a competent subject for a *judicial sale* as the property of the York Buildings Company.

Then, as to the common agent, Mr. Bremner was never le- gally appointed common agent in the ranking and sale. A common agent is a person elected by the majority of the cre- ditors, and approved of by the Court, according to the known forms provided therein. Here, at the time, there were no creditors to elect. He was therefore originally named by the appellants, and received by the Court, and consequently to be viewed as their agent, whom they are entitled to dis- miss, as well as to appoint. The old process of ranking and sale was also at an end, so that there was nothing which entitled the Court to resort to the proceeding followed forth by the common agent. But supposing his appointment to be valid, yet still the common agent has so conducted himself in these proceedings as to call for his dismissal, because it is the duty of a common agent to attend chiefly to the interest of the common debtor, to preserve the fund, and to take care that all objections be stated to every claim of debt that is not duly supported. He is more imperatively bound to this, because the common debtor being made bankrupt, is presumed in law to have no funds, and therefore is pre- vented from attending to his own interest. But in place of

this, the common agent has done every thing in his power to injure the appellants' right. His object all along was to perpetuate the proceedings, and with this view to magnify a list of the debts, without discriminating, as was his duty, whether these were good or valid debts, or were such as were totally unsupported and objectionable. Mr. Bremner ought therefore to be removed; and, in the circumstances, where it is apparent that there will be a reversion, the obvious and usual course is to allow the common debtors access to the estate, so that they may avail themselves of that fund, and attend to their interest in regard to unfounded claims wished to be ranked upon it.

Pleaded for the Respondents.—In regard to the competency of the sale, the act obtained by the York Buildings Company for expediting the sale of their estates, proceeds on the narrative, that the said Company's estates have long since been insolvent, and that "the lands and estates of the said Company, which have been long neglected and uncultivated, while remaining in the hands of an insolvent company, will, by being transferred to purchasers, be improved to the benefit of the public."

And further, "that the Judges of the said Court of Session shall, and are hereby directed to proceed to the sale of the said estates, and in the ranking and classing of the creditors, and dividing the price in the same manner and form as is laid down in the several laws and regulations of the Court respecting the sale of bankrupt estates." While this act remained unrepealed, the duty of the Court of Session under it was clear and obvious; and so long as a single creditor remained in the field, the Court was bound to proceed with the sales of the estates, and division of the price, until the whole lands were sold, and the whole fund divided. The application, therefore, made by the common agent in January 1796, in pursuance of the statute, was perfectly regular and competent. Even at common law, and by the general statutes respecting sales of bankrupt estates, a sale of part of the lands being reduced, the lands fall back into the situation in which they were before, and may and must be sold judicially under the original process of sale, at the requisition of any creditor or creditors remaining unpaid; and the terms of the judgment of the House of Lords show that it was the intention that the rights of creditors should be secure; and the Company themselves were at first approvers of the sale. In reference to the removal of the

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common agent, it is sufficient to say that he is responsible for his faithfully discharging his duty. He comes in place of the bankrupts. He acts, having both *their* interest and the interest of the creditors to attend to. But in such case the law will not allow of the interference of the common debtor. It may be true, where the common debtor can show some reasonable prospect of reversion, his interference in the appointment of the common agent may be allowed. But, in order to entitle them to this right, they would have to show that they are not bankrupt, and above all, to prove some specific charge against the common agent, in order to entitle him to be removed. Nothing of this kind has been done; the assertions as to his raising up the amount of debts, so as to give an appearance of bankruptcy, being unfounded; and the Court have justly held, that as he derived his appointment alone from it, he was responsible to the Court alone.

After hearing counsel,

LORD CHANCELLOR LOUGHBOROUGH said,

“MY LORDS,

“It appears to me that the interlocutor of the Court of Session, of March 1792, which is not appealed from, is a complete answer to the whole of the argument used for the appellants in this question. If that interlocutor be to stand, the whole subsequent proceedings held in consequence of it must stand likewise. I have a great respect for the opinion of several persons whose names are signed to the appellants' case, and who must have recommended the appeal as advisable; but, upon the ground of that interlocutor, I am of opinion it must go for nothing. There has been, however, so much abuse bestowed upon the Court of Session on the part of the appellants, that I think it calls for some particular notice from your Lordships.

“If there be any real reversion to be expected by the York Buildings Company, I am astonished to see so much powder and shot thrown away in their affairs. In all the steps taken, preparatory to the sale of Seton, the Company assisted Mr. Bremner with their advice; the upset price was proposed by them through the medium of Mr. Bremner, and they were not to interfere farther in that measure. But their conduct since has been totally altered; they have appealed from all the interlocutors of the Court of Session within the time limited for appeals by the order of this House, and that by the lump, and, in several instances, without *gravamine* on their part.

“It is gravely stated in their case, that the former judgment of this House, in their appeal with Mackenzie, has been so unhappily conceived, that it cannot be carried into effect consistently with the

law of Scotland; and we are told, that it is the opinion of great names, that under that judgment no title can be made to a purchaser. I shall very much lament to find that the Court of Session cannot carry it into effect. But we must not have private opinions set up in opposition to that judgment.

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“ Upon these considerations, I shall move that the interlocutor in this case be affirmed, with £100 costs.”

It was accordingly

Ordered and adjudged that the interlocutors complained of be affirmed, with £100 costs.

For Appellant, *Sir John Scott, R. Dundas, J. Mansfield,*
John Clerk.

For Respondents, *J. Anstruther, Mat. Ross, D. Monypenny.*

The GOVERNOR AND COMPANY OF UNDER-
TAKERS for raising the Thames Water in } *Appellants ;*
York Buildings,

JAMES BREMNER, Writer in Edinburgh, *Respondent.*

House of Lords, 19th June 1797.

EXPENSES—RANKING AND SALE—The common agent having applied to the Court for a warrant for £1000 out of the York Buildings Co.’s funds, to defray the expenses incurred, and to be incurred, in the preceding causes, pending the appeal of the judgments therein, the Court granted warrant accordingly, and, on appeal, this order of the Court was affirmed.

In the course of the proceedings which issued in the two preceding appeals, it has been seen that Mr. Bremner, the respondent, was appointed common agent in the ranking and sale, in room of Mr. Scott, who resigned.

The respondent, as common agent, gave in a petition, praying the Court to issue an order, to pay out of the funds of the estate the sum of £1000. on account of costs incurred in the Court of Session, and to be incurred in discussing the preceding appeal.

The answer made by the appellants was, That they had appealed against the interlocutors of the Court in these

1797. proceedings; and that every question was now before your
 Lordships, and, among the rest, the question, Whether Mr.
 YORK BUILD- Bremner should be entitled to draw out of their funds any
 INGS CO. part of the expense he had incurred, or should incur in the
 v. business?
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Mar. 11, 1797. The Court pronounced this interlocutor:—"The Lords
 "recall the warrant formerly granted upon the treasurer of
 "the Bank of Scotland, and grant warrant to and authorize
 "and ordain Mr. Archibald Swinton, factor upon the seques-
 "trated estate of Seton, out of the rents of said estate in
 "his hands, to make payment to the petitioner, Mr. Brem-
 "ner, of the sum of one thousand pounds, sterling, a pro-
 "per receipt being granted for the same, and decern."

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—When an appeal to your Lordships against a judgment of the Court of Session is served upon the party, it has the effect to stay execution of the sentence till the appeal be either discussed or withdrawn. The reason being, that nothing ought to be done prejudicial to the question before your Lordships, or which may have the effect to deprive the appellant of the full redress which he seeks by appeal. And it is even held, that by appealing, the whole cause is brought before your Lordships, and removed entirely from the jurisdiction of the Court of Session. And the only exception to this rule was introduced by the late Scots Bankrupt Act, 33 Geo. III., c. 74, § 55, in regard to ranking and sales, which exception has reference to the competency of the Court, notwithstanding appeal, to make such orders as may be necessary to prevent the funds "from being embezzled, secreted, "damaged, or dilapidated, while the appeal is pendent," which is just what the appellants have contended for, and contend for in the present appeal.

Pleaded for the Respondent.—The respondent is an officer of Court, acting under its authority and appointment, for carrying into execution an act of Parliament, passed for the express purpose of "expediting the sale of "the estate of the York Buildings Co. for relief of their "creditors," which enacts and declares, "That the expense "thereof, and of carrying the same into execution for be- "hoof of the creditors, shall be defrayed from the proceeds "of the said estates, in the same way and manner as the

“ expense of process of ranking and sale of bankrupt estates
 “ before the Court of Session is usually defrayed ; and the
 “ judges of the said Court of Session are hereby directed
 “ and empowered, to issue their warrants for payment of
 “ such expense to the person or persons who shall advance
 “ the same.” In this state of the law, there is not the
 slightest ground for the present appeal.

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The Lord Chancellor, when delivering judgment in the preceding appeal, at same time moved simply, that the present appeal be dismissed, and the interlocutors complained of be affirmed.

It was ordered and adjudged, that the interlocutor be affirmed.

For Appellants, *R. Dundas*.

For Respondent, *G. Ferguson*.

MESSRS. ROBERT SCOTT MONCRIEFF, and
 DAVID DALE, Cashiers of the Royal Bank
 of Scotland, and WM. SIMPSON, Cashier
 at the said Bank, Edinburgh, } *Appellants ;*

JAS. DUNLOP, Merchant in Glasgow, AN-
 DREW HOUSTON of Jordanhill, JAS. GAM-
 MELL, Merchant in Greenock, and JAS.
 MACDOWALL, Merchant in Glasgow,
 Bankers in Greenock, trading under the
 Firm of DUNLOP, HOUSTON, GAMMELL and
 Company, } *Respondents.*

House of Lords, 17th July 1797.

BANKING Co.—AGENT—PARTNER—POWERS TO BIND COMPANY.—

The Greenock Banking Company had an agent in Glasgow, Mr. Dunlop. It being necessary to enter into arrangements with the several banks to receive their notes, this was done through means of their agent. Afterwards Mr. Dunlop entered into a new transaction by which this object was to be carried on more to the satisfaction of both parties. Held, on the failure of Dunlop, that, from the terms of the transaction gone into, the bank was not sufficiently bound by the acts of their agent and partner.

The respondents having opened a bank in Greenock, the Company affairs were managed by Mr. Gammell in Greenock, and by Mr. Dunlop in Glasgow.

Desirous to establish their credit, they entered into the usual

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arrangements, in regard to other banks receiving the notes they issued; and among the rest, with the Royal Bank, through its manager in Glasgow, Mr. Scott Moncrieff, in the following terms:—" *Greenock, 28th July 1785*,—Scott Moncrieff, Esq.,—Sir, Messrs. Dunlop, Houston, Gammell, and Co., having opened a bank here, and appointed me their cashier, I have to inform you, that Mr. James Dunlop of Garnkirk will exchange with you regularly once a-week, what of this Company's notes may come into your hands, and upon your advising me what day of the week is most convenient for you to exchange notes, I will give Mr. Dunlop notice thereof. I am, &c., (Signed) JAS. MILLAR."

Messrs. Scott Moncrieff and Dale answered in these words:—" *Royal Bank Office, Glasgow, 1st August 1785*.—Sir, We duly received your favour of the 28th past, and, agreeable to your proposal, shall make a weekly exchange of notes with your Company, and give or take a bill on Edinburgh, at one day's date, for the balance, as is our practice with the other banks here. If not attended with any inconvenience to you, we would propose to make the exchange on the *Tuesday* morning at eight o'clock, when we settle with the other banks. Of this you will be pleased to acquaint Mr. Dunlop.—We are, &c.

(Signed) "SCOTT MONCRIEFF & DALE."

It was alleged by the respondents that these letters were all that ever passed between their office at Greenock and the appellants.

The parties entered on the transaction as thus arranged; but it was not long until the Royal Bank found, that from the great flow of their paper into their hands, which lay dead until the day of exchange, considerable loss was sustained, and they therefore entered into a new arrangement with Mr. Dunlop, to have the exchange of notes twice a week; and a bill granted at one day's date for any balance that may be found in their favour. This arrangement, it seems, was gone into verbally with Mr. Dunlop, but it was proved by the following letter, that Mr. Dunlop communicated this alteration to Mr. Gammell at Greenock:—" *2d July 1789*,—" I have settled with the Royal Bank that we shall exchange with them every Saturday morning, which I expect to manage, so that it shall make no alteration in the operations of the Greenock Bank, but shall come all under the Tuesday's exchange with me. On considering the matter, I thought it better to make the communication to Mr. Scott

“ by word of mouth than by letter, which keeps us perfectly open, in case of any future change in their arrangements.—I am,” &c. Mr. Gammell answered :—“ I am favoured with your letter of yesterday’s date, with the enclosure, which is perfectly satisfactory. I am pleased that you have informed Mr. Scott Moncrieff that you are to exchange with him twice a week, and the mode you propose I think will be attended with no loss to the bank, at same time it pleases them.—I am,” &c.

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Notwithstanding this arrangement, repeated complaints were made by the Royal Bank, in consequence of the overflow of the Greenock Bank notes into their bank, which no sooner were exchanged the one moment than they were returned back upon them the next, until they were obliged to remonstrate, which gave rise to the transaction or agreement out of which the present action arises. This agreement was prefaced by a correspondence, which complained generally of the mode of conducting the exchange, and the daily loss of interest sustained by the Royal Bank, and proposed, “ that in future Mr. Dunlop should keep an account with us like any other man, on such credit as should be agreed on, and that on every second day (Tuesdays, Thursdays, and Saturdays) we should pack up all the Greenock notes we had, and deliver them over to him, for which he should give us an order on his account with us.”

Some of the complaints were made to Mr. Gammell, but the greater part to Mr. Dunlop.

Accordingly, a draft of the letter of agreement was sent by Mr. Scott Moncrieff to Mr. Dunlop (*Vide* below). Mr. Dunlop

Draft proposed by Mr. SCOTT MONCRIEFF.

“ GENTLEMEN,—In the management of the business of the Greenock Banking Company, and that I may be enabled to take up their notes from you in a manner more convenient for *us both* than hitherto, I shall be glad to open a cash-account with *you*, as cashiers of the Royal Bank here, *to be kept* in the name of James Dunlop, *for the Greenock Banking Company*; and I propose that my operations upon the account shall be as follows :—I shall, three times in the week, viz. upon Tuesdays, Thursdays, and Saturdays, take up such of the notes of the Greenock Banking Company as may come into your hands, by giving an order on my account with you for the amount; and I shall make payment to you upon said account on your receipts in the manner most convenient for myself, either by notes of

“ see the effect of this arrangement, I cannot say exactly
 “ what extent of credit I may require upon this account;
 “ but it will always be in your power to limit it; and I shall
 “ at any time, upon six weeks’ notice, pay up such balance
 “ as may be due to you. It is further understood, that as
 “ this account is proposed to be opened for our mutual con-
 “ veniency, it shall at all times be in the power of either of
 “ us to close it when we shall think that purpose not an-
 “ swered by it.—I am, &c.

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(Signed) “ JAMES DUNLOP.”

Copy order sent.

Pay to the bearer £2226. 19s., and charge the same
 to account of J.A. DUNLOP.

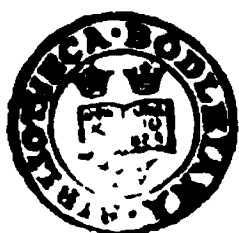
Of this date, Mr. Scott Moncrieff wrote Mr. Simpson as Jan. 1, 1793.
 follows:—“ I met Mr. Dunlop last night, and carried with
 me the scroll of a letter which I thought it would be neces-
 sary for him to write to us, as the foundation of the pro-
 posed account, and that we might clearly understand each
 other. He approved of it, and brought here his letter this
 morning accordingly, with some trifling alterations. You
 have annexed an exact copy of it. I mean, if you approve
 of it, to make out another copy, and send it to him, saying
 at the foot of it, that we agree.” “ *I think the Banking
 Company is sufficiently bound, the account being opened with
 him, their agent.*”

Accordingly, the letter, approving of this letter, was writ-
 ten to Dunlop, and the transaction closed; and, immedi-
 ately thereafter, the account was opened. The new arrange-
 ment was communicated to Gammell, the acting partner of
 the Greenock Bank, by Dunlop, as follows:—

“ The Royal Bank have been complaining very much
 “ of late, and perhaps with some reason, of the number of
 “ notes that were thrown in upon them, especially on the
 “ Saturdays; and, two or three days ago, Mr. Scott Mon-
 “ crieff called, and told me that he had orders from the
 “ directors at Edinburgh, either to refuse our notes alto-
 “ gether, or to send them to Greenock on purpose every
 “ day, which, he said, would be much cheaper to them than
 “ the way they are in at present; which, indeed, I believe
 “ may be true. I said, if such measures as those were re-
 “ sorted to, I believe we could procure as many of their
 “ notes as they could do ours. He said, however that might

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“ be, he had directions to make the experiment; at the
 “ same time, he would be extremely sorry to take a step of
 “ that kind, if any plan could be fallen on to prevent it. I
 “ told him that I could think of none, for I could by no
 “ means advise the Greenock Bank to alter the mode of
 “ making their exchanges, which had been settled by mu-
 “ tual agreement. At the same time, as the management of
 “ these exchanges *had been left entirely to me*, if he could
 “ think of any way in which I, as agent, could accommodate
 “ them, I would have no objection to try it. After several
 “ conversations, he at last made a proposal, which I told
 “ him I would make a trial of, with which he seemed very
 “ well satisfied; and, in my opinion, will make so very little
 “ difference, if any, to me, that I can continue to settle the
 “ exchanges with the bank in the same way as formerly;
 “ *and I agreed the more readily*, as I think it will prevent a
 “ great number of notes from going to Edinburgh; the pro-
 “ curing of Edinburgh money, *to replace which has been at-*
 “ *tended not only with expense to the bank, but lately very*
 “ *great trouble to me*; and no doubt it has also been trouble-
 “ some to Sir William Forbes & Co.”



Mr. Gammell's answer to Mr. Dunlop was as follows:—

“ 1st January 1793.—I am glad you have settled
 “ matters with Mr. Scott Moncreiff, and that upon such a
 “ plan as will prevent our notes from going to Edinburgh,
 “ which was troublesome to all parties concerned.”

Mar. 1, 1793. Sometime after the operations were entered on, and in consequence of the public state of credit, the Royal Bank found it necessary to restrict their advances, and to give orders to close this account in the beginning of March 1793. Accordingly, Mr. Scott Moncrieff wrote to Mr. Dunlop, calling up the balance owing; but these applications had produced no result, when, on the 21st March, Dunlop failed. This event was first communicated to the Royal Bank by Mr. Gammell, who at same time intimated, that as the transaction was one with Mr. Dunlop alone, the Greenock Bank did not hold themselves liable for the balance due of their notes delivered to Mr. Dunlop. Upon denying their liability, the present action was raised against the Greenock Bank, under the firm of Dunlop, Houston, Gammell & Co., for payment of the balance due, amounting to £9100. of principal, and £82. 2s. 11d. of interest.

In defence the respondents pleaded,—“That the part-
 “ ners of the Company of Dunlop, Houston, Gammell, & Co.,

“ bankers in Greenock, are not liable as a Company for the
 “ sums now sued for, they having given no authority to
 “ James Dunlop to enter into the agreement with the pur-
 “ suers for a cash account, which the pursuers solely entered
 “ into, on the risk of the said James Dunlop, as an indivi-
 “ dual.”

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The Lord Ordinary reported the case to the Court, and this interlocutor was pronounced :—“ Upon report of Lord Nov. 14, 1794.
 “ Craig, and having advised the mutual informations for both
 “ parties, with minutes of debate, the Lords sustain the de-
 “ fence, assoilzie the defenders as a Company, and decern ;
 “ but remit to the Lord Ordinary to hear parties how far
 “ any of the partners of the Company are liable as indivi-
 “ duals, and to do as he shall see cause.”

This reservation in the interlocutor was occasioned by its appearing to the Court, that though there seemed to be a defect of evidence to charge the Company, or whole partners of the Greenock bank ; yet there was a distinction as to Mr. Gammell, who appeared to be apprized of the transaction, and approved of it.

The appellants reclaimed, and prayed to alter, or to allow evidence to be given in upon a variety of points. And the proof asked being allowed, the Court finally pronounced this interlocutor :—“ The Lords having advised this petition, Jan. 19, 1796.
 “ and additional petition, with the answers thereto, and
 “ proof adduced, they adhere to the former interlocutor
 “ reclaimed against.”

Against these interlocutors the Royal Bank brought the present appeal to the House of Lords.

Pleaded for the Appellants.—The debt is proved to have arisen from the value of the notes issued by the respondents as a banking Company, and which the appellants, for their accommodation, took from the public as payments in money ; the respondents were therefore bound in law and in justice, and in fair dealing, to retire these notes from the appellants, so as no loss might arise to them from the outlay and want of interest, or in any other shape. To accomplish this, they by the letter from their cashier, of the 28th July 1785, accredited Mr. Dunlop, one of their own number, with general and unlimited powers, to exchange or retire these notes. The notes having accordingly been delivered over by the appellants to Mr. Dunlop, it is for the respondents to show, either that value was given for them, or that, in delivering them to Mr. Dunlop, the appellants expressly and unequi-

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vocally renounced the security of the respondents as a Company, and made a loan thereof to Mr. Dunlop, as an individual. This is the plain and true shape of the present question, and not whether Mr. Dunlop, by the arrangement in Jan. 1793, created a new obligation upon the Company, which did not previously exist. There was not, nor could be, occasion for any such new obligation. The Company were bound, in every sense, for the value of their notes; and when they referred to Mr. Dunlop, as the person who was authorised to take them up, all that was incumbent on the appellants, in order to preserve that obligation entire, was to fix and ascertain, in an explicit manner, the delivery to Mr. Dunlop, as acting under that authority, and to this only effect, and to indemnify the appellants of interest, was the arrangement in question. The terms of the interchanged missives on that occasion prove this. Mr. Dunlop, *as agent for the Company* there, says:—" *I shall, three times in the week, take up such of the notes of the Greenock Company as may come into your hands, by giving you what Royal Bank notes I may have, and an order on my account for the balance; and I shall make payment on said account, on your receipt, in the manner most convenient for myself, either by notes of other Banking companies' bills in Edinburgh or London, &c. The accounts shall be settled once a year, or oftener, if either party requires it.*" The respondents have attempted to assimilate this to a common cash credit to Mr. Dunlop, and with those ignorant of the nature of bank transactions, they might be listened to, as the operations that were to follow were, no doubt, to be all in cash; and Mr. Dunlop was to get the command of all the Company's notes. But could the respondents hold such language to a banker? Would they be hearkened to one moment, in saying that an account, in which nothing was to pass but the amount of their notes, delivered to their partner or agent, was of the nature of an ordinary cash credit? Or is it fit for belief, that a national bank, whose great advantage is the issuing and circulation of their own notes, would give a cash credit to an individual, and make the whole advances upon it in the notes of a private provincial company, in order that they might be thrown into the cricle? There is no countenance for such a proposition, either in law or principle. 2d. The arrangement in question, and the operations consequent thereon, were for the benefit and ad-

vantage of the Greenock Bank, and *in rem versam* of the respondents. This is made evident from the letters and other evidence in the cause. In particular, Mr. Dunlop, in his letter of 5th Jan. 1793, to Mr. Gammell, writes:—"The Royal Bank have been complaining very much," and informs him of the arrangement made for the benefit of the bank. In answer, Mr. Gammell writes:—"I am glad you " have settled matters amicably with Mr. Scott Moncrieff, " and that upon such a plan as will prevent our notes from " going to Edinburgh, which was troublesome to all parties." Other letters were also written to the same effect.

Hence it was clear that this arrangement had a twofold object, 1st. To prevent the Greenock Company's notes being refused at the Royal Bank office, or sent down from thence to Greenock for payment; and, 2d. To prevent those notes from going to Edinburgh, which occasioned great expense and trouble to the Greenock Company. All these objects were completely and effectually accomplished by the arrangement gone into. 3d. And even though this arrangement of January 1793 were to be held a new obligation come under by Dunlop, and that loss had arisen upon it to his Company, yet the respondents must be liable to make it good; because Dunlop had the sole direction and management of this branch of the extensive banking business in Glasgow, and, in particular, he had been publicly announced by the letter of 28th July 1785, to the appellants, as entrusted with the exchange or retirement of their notes. His powers, therefore, to bind the Company in any transaction relating to the concerns confided to his management were inherent and indispensable, and he accordingly did pledge the security of the Company, in the transaction in question.

Pleaded for the Respondents.—If the present case admitted of the general question, "How far James Dunlop, as a partner of the Greenock Banking Company, had power to bind the Company?" it would be matter of no great difficulty to show that he could not, as such, have affected the Company by the agreement or transaction in question. It is true that a partner, who is seen publicly and generally to act in that character, may by transactions *in the common and ordinary course of their business*, and signing the firm of their company, bind the partnership to those who have so transacted with him, to any extent, and without any regard to all private and secret articles of agreement among the

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1797. several partners themselves, not known to those with whom
such partner has so transacted. And the reason is plain.
MONCRIEFF, All the partners, in such a case, give a general credit to
&c. each individual partner, for the purpose of carrying on the
v. ordinary course of business, and their contract, or articles
DUNLOP, &c. of copartnership, can only operate as private regulations for
the adjustment of their own separate interests. But the
very reverse of all this is the case at present. The Greenock
Banking Company did not carry out their business upon
private articles of partnership. They were published in
newspapers, and notice thereby given that the business they
were to carry on was that of bankers, and that in the course
of that business the firm of the Company was to be signed
by "James Miller, their cashier." Nor is it pretended by the
appellants that this had never come to their knowledge.
The Royal Bank cannot well maintain that they are ignorant
of the business of banking, or of the usage or manner ac-
cording to which such business is carried on by banking
companies. Neither will they say that the public notice
which had been given as above never came to their know-
ledge. They knew that Greenock was the seat of the
Greenock Banking Company—that *there* contracts and
agreements affecting the general business of this company
were to be settled and concluded; that *there* only the
firm of the house could be signed; and that the firm, under
the signature of the cashier, was essential to the binding
force of every instrument for carrying such contracts or a-
greements into execution. Besides, they knew that Mr.
Gammell, residing at Greenock, was the active partner, and
that Mr. Dunlop, who was the *mere agent* of the branch in
Glasgow, had no general powers; and his acting as special
agent did not entitle him, without special powers, to enter
into any transactions. 2. But further, the appellants trans-
acted with Mr. Dunlop, not merely as agent, but as a spe-
cial agent, accredited to them as such by an express com-
mission in writing, defining the precise powers and purposes
of his agency, and as such received and expressly acknow-
ledged by the appellants. This letter was dated from
Greenock, under the hands of Miller the cashier, and was
agreeably to the articles of partnership, and the public no-
tice they had given. The first agreement was that of mere
exchange of notes of the bank, and was a transaction strict-
ly between the Greenock Bank on the one hand and the
Royal Bank on the other. But this was changed into one

of a very different nature by their agent. It was a credit opened by him, although he was a mere agent, with restricted and special powers. He had no power or authority from the bank to enter into such an obligation. In short, it was understood by the Royal Bank themselves, that the Greenock Bank was not to be bound. They deal with Dunlop alone, and they consent to take an obligation, signed by himself, and which they must have known did not and could not bind the bank. And Dunlop himself gave good reason for the appellants to understand that he never meant to bind the Greenock Bank at all by the alteration of the letter written and signed by him. Indeed, from his capacity of agent merely, it must have been understood by all that he, as agent, could not bind the Greenock Bank without having express and special powers so to do.

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After heaving counsel,

LORD CHANCELLOR LOUGHBOROUGH said,—

“ My LORDS,

“ Though I concur in this case with the judgment given by the Court of Session, I think it proper to state the ground upon which my opinion is formed, lest an idea should be entertained that we went upon this reason, that a partner, in circumstances similar to those in the present case, could not by his own transaction bind the partnership. It is not upon that ground that I have formed my opinion.

“ It is founded upon this, that from the written document, which is the basis of the transaction now in question, the letter of the 1st of January 1793, it would be impossible in this country to raise a cause of action against the respondents in this matter. The whole of the difficulty in the present case lies upon the evidence in the cause—the letter of Mr. Scott Moncrieff and Mr. Simpson ; though these were not evidence of themselves, they were made so by the parties. Nothing positive with regard to the transaction appears from Dunlop's letters ; but, on the other hand, we have his deposition after his bankruptcy, that this was a private transaction of his own, and all the entries in his books state it as his own private account.

“ This is a case in which I have changed my opinion more than once or twice. There appears to me to be nothing in the cause to fix upon Mr. Gammell in the smallest degree—the double part which Dunlop appears to have acted. The other partners were inactive. I am sorry for the manner in which Mr. Scott Moncrieff appears in the business, as, from the character given of him, he is a man of respectability and integrity ; but too much confidence was reposed in the supposed responsibility of Dunlop. It is

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not unlikely that Dunlop saw the error into which Scott Moncrieff was falling, for the latter makes no difficulty in accepting the draft which had been so much, and so materially altered by Dunlop, and sees no difference between the two papers, calling them trifling alterations.

“ Under the circumstances of the present case, I thought it proper not to rest upon my own opinion alone. I would willingly have rested on the opinion of those whom I respected, had that opinion been uniform on either side. I requested the assistance of a noble *Lord* now near me, and after reading the case, his Lordship formed an opinion different from what I have now given ; he, however, now concurs with me in opinion to affirm the judgment of the Court of Session.

“ *Two judges* also, of much acuteness, and great experience in such questions, were applied to ; they differed in opinion, and after having had a conference together on the subject, they parted still holding different opinions.

“ Under all the circumstances of this case, I think the judgment of the Court of Session is not founded on error, and ought to be affirmed. The decision of your Lordships, if in this way, will also have a good effect. It will give a lesson to the Royal Bank to be more circumspect, and to pay a greater attention to accuracy in their future transactions.”

Accordingly it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Sir John Scott, Ro. Dundas, W. Grant.*
 For Respondents, *Robert Dallas, Wm. Tait.*

THOMAS SMART, Mason in Dundee, *Appellant ;*
 The MAGISTRATES and TOWN COUNCIL of }
 Dundee, - - - - - *Respondents.*

House of Lords, 22d Nov. 1797.

PROPERTY—ACCESSION—SEA SHORE—BURGH.—A proprietor of a tenement within burgh, whose property is bounded by the sea flood, cannot acquire the vacant space of ground left by the sea, be-

tween his property and the sea flood, such soil belonging to the magistrates of the burgh, for the benefit of the community.

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The appellant, possessing a tenement and piece of ground in the town of Dundee, described in his title-deeds as “All and whole that *enclosed* yard, lying within the burgh of Dundee, bounded by a tenement of land and yard belonging to the heirs of William Mitchell, ship-builder in Dundee, and another small tenement, belonging to the heirs of James Kay, on the east, the *sea flood upon the south*, a yard belonging to David Laird of Straithmartin on the west, and by the street on the north parts, with all right, title, and interest, claim of right, property, and possession, &c.”

The town of Dundee lies at the mouth of the river Tay. The sea flood at one time had washed the southern boundary of the appellant's tenement, but now, from various causes, there was a considerable space of ground between his south wall and the sea flood; the magistrates of the burgh having from time to time taken possession of this vacant ground, the appellant raised action of declarator to have his right to the same fixed and determined; contending that in all the title deeds of his property, the same was described as *bounded by the sea flood* on the south. That it was so bounded when he purchased the property—that this being his boundary, he was entitled to all within these bounds, and, of consequence, to the vacant space of ground in question, whether the same has been gained or occasioned by the gradual retiring of the tide, or whether the soil has been recovered from the sea by an *opus manufactum*, and that the sea flood being his boundary, he was entitled to follow the course of the river wherever it went. In their defences, the magistrates stated their title as a corporation, to enjoy certain rights and privileges, and to acquire for the benefit of the community, all the rights thereto belonging. They admitted the doctrine, that when the property of a proprietor is bounded by the sea or the river, he has a right to the soil that may be acquired from either; but that this did not apply to a property described as an *enclosed* garden within burgh, where the magistrates, as an incorporation, are entitled to all the soil not expressly granted away. Besides, the appellant's title was defective. He had only a base infestment, and no charter to show from the superior, which could not compete with the respondents' title of the burgh and possession.

The Lord Ordinary (Monbodo) held, “that the magistrates,

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in so far as concerns the river and frith of Tay, had only right to the same for the purposes of navigation, and that, as the pursuer's property was described as bounded on the south by the sea flood, he had a right to whatever land the sea leaves adjoining and opposite to his property, or that he might acquire by any *opus manufactum*, not prejudicial to the navigation." But, on reclaiming petition, the Court altered, sustained the defences, assoilzied the defenders, and decerned : And, on a second reclaiming petition, they adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The appellant purchased a piece of ground in question, situated in the burgh of Dundee, bounded by the sea flood, the value of which considerably enhanced its price. He then proceeded to embank a part of the sea-shore, when he was interrupted by the magistrates of Dundee, who proceeded to embank the remainder of the beach, besides seizing that portion of it which had been taken possession of by the appellant. The question thus came to be, whether the appellant, whose property is bounded by the sea flood, is entitled to all the accession of ground and soil which the sea flood leaves unoccupied opposite to his property ? He humbly submits, both by the principles of the Roman law and the law of Scotland, that such ground belongs to him, whether acquired by the operation of nature, or of the works of human industry. By the Roman law, banks of rivers, though navigable, belonged to the adjacent proprietors. That the shores even of the ocean, are capable of occupancy, although this always subject of course to the rights of navigation and commerce, which must not thereby be hurt, nor the rights of the community. Whether, therefore, the Tay at Dundee be considered merely as a navigable river, or as a part of the ocean, the right of the appellant is, on either ground, clear ; because in the law of Scotland, no difference exists between the one right and the other. In both, the sovereign is the trustee for the public, and as such has a right to prevent all appropriations, such as would impede navigation, render it dangerous, or hurt the interests of commerce : That all grants in favour of incorporations or burghs is of the same nature. In particular, a grant of a port and harbour, gives to a certain extent the same privileges as possessed by the sovereign within a defined space, and always for the purposes of navigation and commerce ; but this leaves unimpaired the right of proprietors bounded by the sea flood, of gaining

whatever ground the sea may leave adjacent to their own property. In the present case, the magistrates wish to deprive the appellant of this right, by asserting that the burgh has a right to all the unoccupied soil so gained, as a pertinent of the greater right of the burgh, apart altogether from the purposes of navigation or commerce. The appellant humbly submits that there is no law for this.

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Pleaded for the Respondents.—The reference to the civil law, and to the cases in the law of Scotland, are all inapplicable to the present case. The doctrine, that a proprietor, whose property is bounded by the sea flood, is entitled to gain all the vacant ground left between him and the sea, is indisputable, where no other can show a preferable title to that ground; but such law does not hold with reference to a tenement within burgh, where the incorporation is entitled to all the soil not expressly granted away. A property so bounded within burgh is a limited grant, just as if it had been stated to be bounded by another tenement; because the whole territory of the burgh belongs to the magistrates as a corporation, and, in particular, the bed of the river and sea; and it is in evidence, that they have been in immemorial possession, and have from time to time feued, or made grants of the soil so acquired, without challenge. This general right, therefore, of the respondents to the whole territory of the burgh can only be counteracted by clear titles produced by the burgesses or feuars, containing an express conveyance of such. The appellant has produced no such title; and no title even to his enclosed garden sufficient to protect that possession, were the respondents disposed to quarrel it. He alleged, that he held under the Douglas' family as superior; but, being obliged to abandon this proposition as untenable, he cannot produce any charter from the burgh, and all that he can show, is a minute of council promising a charter to his predecessor. The appellant, therefore, at most, cannot claim an inch of ground beyond the garden or enclosure. What is given to him is not *ager arcifinius*, it is *ager limitatus*. An enclosed garden, and the ground enclosed by the walls of a garden, are one and the same thing.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors be affirmed.
For Appellant, *T. Erskine, W. Adam, Henry Erskine, H. D. Inglis.*

For Respondents, *Sir John Scott, Wm. Tait.*

NOTE.—Unreported in Court of Session.

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[M, 12761.]

DUGGAN
v.
WIGHT.

FRANCIS DUGGAN, Druggist, . . . Appellant;
ALEXANDER WIGHT, W.S., . . . Respondent.

House of Lords, 24th Nov. 1797.

TRUST—ACT 1696—PAROLE PROOF.—Circumstances in which a letter, written by a party holding a right to property, *ex facie absolute*, did not establish that he held it only in trust: Also, that the parole evidence offered was incompetent to qualify a title to property *ex facie absolute*.

This was an action of declarator of trust, brought by the appellant in the Court of Session, to have it found that the lands of Kevockmill, and others, were only held in trust by the respondent for behoof of the appellant, and that they were purchased by and for him alone.

Mr. Wight was a Writer to the Signet; and the appellant alleged, that after effecting the sale himself, he called on Mr. Wight, and arranged with him the conditions of the rights—he, Mr. Wight, assisting him with a loan to pay part of the price.

It was agreed, the appellant stated, that Mr. Wight should take the conveyance to the property unconditionally in his own name; this being necessary, in consequence of the appellant being incapable at the time of holding heritable property, he being a Roman Catholic; but that he had himself negotiated the whole sale personally with the previous proprietor, Mr. Hunter, Mr. Wight not being present, or taking any concern in it. That on expiry of one of the tenant's leases, he took possession of that portion of the lands as proprietor, without any lease from, or paying any rent to Mr. Wight: That he laid out large sums in improvement of the lands, and building houses: And further, that he had received an express acknowledgment from Mr. Wight, in a letter addressed to his agent, of his having bought the lands with a view to surrender them to him. Mr. Wight declares, "It is indeed true, that at this time I said to Mr. Duggan that I had no wish to become a proprietor of land, and that, in case he chose to take it at the end of three or four years at farthest, I would give it up to him; and I no doubt said frequently, not only to himself, but to many others, that I had made the purchase with that view. The

“ longest period at which I ever said I would give up the
 “ place to Mr. Duggan, if he chose to take it, expired at
 “ Whitsunday 1792, and I think he will not say he ever
 “ made a proposal at that time to take it, if I would give it
 “ to him; and since that period he declared to myself that
 “ I was at liberty to do with it as I pleased, as I had com-
 “ pletely fulfilled my promise with him.”

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The defence stated to the action, was a denial that he had ever held the property in trust for the appellant. Also a denial of the possession and of the improvements made upon the estate; and founded upon the act 1696, as barring the action, as well as the irrelevancy of a proof by witnesses. Upon these allegations, the Lord Ordinary “ held the proof Feb. 2, 1795. “ incompetent; and in respect that the pursuer does not “ offer to instruct the alleged trust, either by the writ or “ oath of the defender, sustains the defences; assoilzies the “ defender, and decerns;” and disallowed a parole proof. The Court, on reclaiming petition, altered the above interlocutor of the Lord Ordinary, and allowed proof. But, on a Dec. 13, 1796. further petition, the Lords returned again to the Lord Ordinary’s interlocutors, adhered thereto, and assoilzied the 2 and 4 Mar. 1797. defender.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—At common law, every fact might have been proved by witnesses; Balfour’s Practicks, p. 361, § 17; p. 376, § 24. Sir Geo. Mackenzie, Inst. B. iv. tit. 2d, § 8, and particularly in regard to a trust; for, as Lord Stair says:—“ It were to small purpose to refer it to “ his (the trustee’s) oath, for it is presumed that he who “ would steal, would swear; and it is the worst kind of “ stealth to betray trust, and therefore the law alloweth “ that the trust may be proven indirectly by circumstances “ inferring the same.” Stair, Inst. B. iv. tit. 45, § 21.

2. The act 1696, c. 25, upon which the respondent relies, relates only to “ deeds of trust made,” and has been held in several cases, (Spreul v. Crawford, 16th July 1741), Kilkerran’s Reports, p. 581; Mudie v. Ochterlony, 13th June 1766, Fac. Col. Dic. of Dec. vol. ii. p. 272), not to extend to any trust which may exist without a deed, as in the case of moveables, or as in the present case, to a trust which does not arise from any deed or disposition of the trustee; but from the voluntary interposition of the trustee. Thus was the law established by these two decisions. And trusts have in various instances been established by facts and cir-

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cumstances, as in the case *M'Laren v. Chiesley's executors*, Dict. of Dec. vol. ii. p. 272. Also in the case of *Gilmour v. Arbuthnot*, 11th Dec. 1765; Fac. Col. Also in three cases not reported, *Alison v. Fairholme*, Nov. 1765; *Stewart's Executors v. M'Arthur*, in 1777; and *Donaldson v. Morison*, decided in 1787. This last case resembled the present. The parties intended to make a joint purchase of two small enclosures near Edinburgh, at a public roup: Donaldson attended and made the purchase, and having afterwards resolved to keep the whole to himself, Morison brought an action against him to compel him to execute the trust he had reposed in him, and in this action Morison prevailed. 3. The present case is taken out of the statute 1696, by the statute 1700, c. 3, against allowing papists to purchase or hold heritable estate, "or any person in trust for their behoof, any lands or houses, &c." But if the statute 1696 did apply, the requirements of that statute are supplied by the respondent's letter above quoted, which clearly acknowledges the trust.

Pleaded for the Respondent.—It is a principle clearly established in the law of Scotland, that an heritable right, instructed by authentic written titles, such as those produced in the present case, cannot be taken away or qualified, or the import thereof be explained by parole evidence. This is the general rule of the law of Scotland,—a rule which all the writers on that law have considered as entitled to the highest approbation. It is even a settled point now, that where a doubt occurs with regard to the import of any clause of a deed, no parole evidence can be admitted, not even of the person who framed the deed, or were present at its execution, to explain what was the real meaning and intention of the parties. An allegation of trust therefore, against the deed, *ex facie* absolute, can never be allowed to be proved by witnesses. And, accordingly, a proof by such witnesses, and of this nature, was the very thing the statute 1696 was enacted to prevent. The decisions referred to by the appellant, do not bear upon the point. The respondent further, has no objections that the letter founded on be read, as his oath in reference, and when so considered, and taken and read as a whole, it will not be found to contain any acknowledgment of trust; it rather seems to import a denial of any such trust, and therefore makes out a negative to the allegation of trust altogether. A proof by witnesses even of those other facts which the appellant alleges, would not suffice to make out a trust; and, at the distance of several years, it would be improper, besides incompetent, to allow

such evidence to qualify an absolute right of property. 1797.
 Besides, the act 1696, in express words states, that nothing
 will be sufficient but the "written declaration or back-bond
 "of trust, lawfully subscribed by the person alleged to be
 "trustee, or unless the same be referred to the oath of the
 "party *simpliciter*."

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After hearing counsel,

LORD LOUGHBOROUGH said,

My Lords :

"I cannot find out where any difficulty lay in this case, so clear
 and conclusive were the terms of the statute 1696; and I would even
 have awarded costs against the appellant, but for the consideration
 that he had obtained an interlocutor of the Court of Session in his
 favour."

It was therefore

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Sir J. Scott, M. Nolan, Thos. W. Baird.*

For Respondent, *R. Blair, W. Grant, W. Tait.*

WALTER SIME, Esq., Collector of Customs } *Appellant;*
 Aberdeen, - - - - -
 THE RIGHT HON. VISCOUNT ARBUTHNOTT, *Respondent.*

House of Lords, 27th Nov. 1797.

LEASE, REDUCTION OF—FRAUD AND FACILITY—FORCE AND FEAR.—

A reduction of a lease, granted while a current lease had still
 many years to run, and made to commence forty-four years after
 its date, was brought, on the ground of its being unequal and
 unfair in its terms, and the granter incapable, from facility, and
 that fraudulent and improper means had been obtained in procur-
 ing it. Held, upon proof, that the lease was bad, and reduced
 accordingly.

This was an action of reduction of a lease granted by the
 respondent's father to the appellant, in the following cir-
 cumstances :—

The late Viscount Arbuthnott had always manifested a
 strong dislike to long leases, and had never been in the
 practice, up to a certain date, of granting leases for more
 than nineteen years.

He died at the age of 88, in April 1791. During the lat-
 ter period of his Lordship's life his mental faculties were
 impaired, and his bodily strength much weakened. The re-
 spondent further stated, that when he succeeded, after his

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father's death, he found, that while labouring under his infirmities, and while without a factor or adviser, he was induced, by improper means, to grant to his tenants, while their existing leases had still many years to run, new leases for a much longer period.

Of the leases on the estate, there were seventy which were made to endure for a longer period than nineteen years. Above forty of the most valuable were obtained while the current leases had a great many years to run. Some of them were to commence at the distance of five years, others at the distance of ten years, and others at the distance of twenty years *from their date*. The lease under challenge could only commence *forty-four years after its date*. Some of the tenants, after his father's death, voluntarily gave them up. He bought up the right of others; but the appellant demanding £3000 for giving up his lease, he was obliged to resist such demands, and to bring the present reduction.

The lease in question was dated 8th March 1786, for *three times nineteen* years after the then ensuing term of Whitsunday (15th May 1786), while there was an existing lease that did not expire until 1830. The rent of the new lease was to be only 58 bolls, 3 firlots of beer, and 4 bolls of meal, and £58. 7s. 1d. in money. While the rent, according to the true value, ought to have been £193.

The grounds of the action of reduction were these, 1st. The great inequality of the bargain, or lesion. 2d. The facility and weakness of mind and body of the granter at the time this lease was obtained. 3d. Imposition and fraudulent means taken to obtain the lease.

The Lord Ordinary, after the disposal of some dilatory defences, ordered first a condescendence and then a proof.

1. Regarding the inequality of the bargain, it was proved, that the true rental of the farm, of that which was partly occupied by Sime, (the rest being possessed by his subtenants,) was £193, that is, about £93 more than the appellant agreed to pay for his lease. And that when the rents which he obtained by the subletting of it were considered, it appeared that the last tack in 1792 to Robert Davidson for the part of the farm subset to him, yielded a rent of £95. 7s. 5d. alone, which was a rent within a few pounds of the whole rent payable to the Viscount for the whole farm. This fact was concealed from the Viscount at the time of granting the new lease.

2. Regarding incapacity, the respondent submitted that

it was not necessary, in such cases as the present, to prove such an absolute want of understanding as renders the party incapable of doing any deed, or executing any business, in a valid and proper manner; but it was sufficient to prove such a degree of weakness or failing, as to render the party an unequal match for those who may take the advantage of facility. And a person might, in this view, be more facile with regard to one kind of business than with regard to another, in particular circumstances. A sudden change in one's actions or ideas, or modes of life, totally inconsistent with former actions, opinions and habits, may manifest this facility, and may make the individual facile *quoad illud negotium*. Here the failing point was in granting leases of long duration, by one who had all his life approved only of leases to the extent of nineteen years' duration; and the whole and slump manner in which this was done, appears at once irrational—fifty-six leases having been granted as very long prorogations of leases then current; and thirty-seven without any rise of rent whatever. Besides this, it was proved that the Viscount, for about seven years before, had failed much in body and his mental faculties, and was considered incapable of transacting any business. He used to remark to one of the witnesses that his memory was gone, and that he was often imposed upon. Other witnesses spoke to his having forgot what they told him before, and that he asked them repeatedly about the same thing.

3. In regard to fraud and imposition. The butler deponed, that he was quite sure that the Viscount was imposed upon in granting leases. About the time mentioned, after a few leases were granted, he was constantly beset by the tenants for the same purpose. In particular, another witness (the appellant's agent) deponed that it was the appellant who employed him to draw out "the lease in question, " and that he got no instructions from Lord Arbuthnott with regard to making out the foresaid tack: That after the scroll was finished, he gave it to Mr. Sime, who returned it at the distance of some weeks, with some corrections in Mr. Sime's own handwriting."

Besides, there was a seizure of smuggled wines in his Lordship's cellars, by which the Viscount was thrown into much fear, which gave the appellant, as Collector of Customs, an advantage over the Viscount, which he used to serve his own interest, by obtaining the lease in question.

The case, with the proof, was reported to the Court,

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which at first pronounced an interlocutor for assoilzing the defender, and finding him entitled to expenses. But, upon advising a reclaiming petition and answers, the Lords finally pronounced this interlocutor: "Sustain the reasons of reduction, so far as applicable to the additional period or prorogation given to the defender by his last lease, beyond the endurance of his former lease; and reduce, decern, and declare accordingly. Find the pursuer (respondent) entitled to expenses."

Against this interlocutor the present appeal was brought.

Pleaded for the Appellant.—The Viscount Arbuthnott, instead of being facile, was a person of uncommon acuteness, and showed great diligence and attention to his affairs, and retained full possession of his faculties to the last. In these circumstances, the prorogation of the lease was a fair and equal transaction—the £10 of additional rent making the new rent equal, or nearly equal, to the value of the farm. But, supposing the rent, with the addition, to have been below the proper value, a prorogation of the lease, to commence at the distance of 44 years, was of very trifling value, and was only a judicious and reasonable encouragement to the appellant, who undertook to make, and was in the course of making, extensive improvements on the faith of it. 2. In cases of facility, it must be proved, not only that facility existed, but that lesion was enorm. In the cases of minority it is laid down that "if the lesion be *inconsiderable*, restitution is excluded." Any lesion, in the present case, must have been to a very trifling extent; and here a distinction may be made betwixt the case of a sale and that of a lease. In a sale, it must always be the object of the seller to get the highest price he can, and in so far as he does not get so high a price as might have been obtained, he makes a bad bargain; but, in letting a farm, it is not the object of a prudent landlord to get the highest rent he can. On the contrary, rack rents are generally condemned; and it is considered as much more for the interest of the proprietor to accept of an inferior rent from a really industrious and substantial tenant, than to risk the farm in the hands of a tenant at a rent beyond what he can pay. 3. From a fair examination of the proof adduced, it fully appears that no fraudulent or improper means were used by the appellant in obtaining the prorogation of his lease in the present case.

Ersk. Inst. B. 1. tit. 7, § 36.

Pleaded for the Respondent.—1. The lease obtained by the appellant was altogether unequal, and that to a degree as to afford intrinsic evidence that the advantage obtained by the appellant must have arisen from ignorance and imbecility on the one part, and improper influence or deception on the other. The rent payable was only £100; but the surplus rents drawn by the appellant from subsetting are upwards of £140, after paying the principal rent. This of itself was sufficient to strike strongly against the lease. 2. At the time when this lease was gone into, the Viscount was so much failed, from old age or other infirmities, as to be exceedingly liable to imposition, and very unfit to enter into any extraordinary transaction of this kind. The facility of the Viscount has been proved, not merely by the direct testimony of those witnesses who had the best opportunity of observing him, but by a great number of facts and circumstances, from which any person who is informed of them. can form an opinion, though the witnesses had not given any opinion on the subject. Total incapacity or want of understanding is what the respondent never alleged, and what, therefore, he is not called on to prove. What he offered to prove, and what he conceives to be sufficient to prove is, that in the latter years of the Viscount's life, when these leases were granted, he was failed in a very great degree, both in body and mind, so as to be unfit to enter into contracts of this nature, and an easy prey to private importunity and solicitation. What rendered this peculiarly the case with regard to leases, was his Lordship's sequestered mode of living, his inability to go over his estate, and his total ignorance of the extent or value of his farms. These, joined to his bodily infirmities and declining years, made him liable to imposition. But when all this is added to the direct evidence of the failure of his mental faculties, afford the most incontestable evidence of his being incapable. 3. The presumption that undue means were used by the appellant, is strongly borne out by the direct proof adduced. The definition of fraud, or "*dolus malus*," is "*quævis caliditas fallacia, machinatio, ad circumveniendum, fallendum, decipiendum alterum, adhibita*." And surely under this description, such influence as that used by the appellant must be included.

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Dig. L. 2, § 2,
De Dolo malo.

After hearing counsel,

LORD CHANCELLOR LOUGHBOROUGH said :—

" My Lords,

" I think the proposal on Mr. Sime's part to the late Lord, for

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an extended period of his then existing tack, which only expired in 1830, for thirteen years, at such a distance of time ; for which he was only to pay an additional rent of £10 yearly, was such an impudent proposal, that it would have been rejected at the *first blush* by a person capable of understanding it.—I am of opinion too, with the Judges of the Court of Session, that this reversionary interest was thus acquired without consideration for it, by means of the fear Lord Arbuthnott had of losing his pension from the seizure of the wine. This matter has been too tenderly handled in the Court of Session ; but the Judges must have been much impressed with the conduct of the appellant, when they loaded him with the whole expense of the litigation, which has been conducted in a most intolerable manner, and which in all probability they would not otherwise have done.

Appellant's Case 23 pages of print ; Respondent's Case 28 pages.

“ It is impossible not to take notice of the length of the cases in this cause ; they are three-fourths full of matter totally irrelevant. These cases, and others like them, I believe are drawn in Scotland, and sent here ready drawn ; but it is the duty of the gentlemen who practise here, when they receive such cases, to redraw them.”

It was therefore

Ordered and adjudged that the appeal be dismissed, and that the interlocutors of the Court below be affirmed.

For Appellant, *Sir J. Scott, J. Anstruther, J. Clerk.*

For Respondent, *R. Dundas, T. Erskine, W. Grant, J. Dickson.*

(M. 2673.)

RICHARD HOTCHKIS, W.S., Trustee on	}	<i>Appellant ;</i>
BERTRAM, GARDNER & Co's Bankrupt		
Estate, - - - - -		
ROYAL BANK, - - - - -		<i>Respondents.</i>

House of Lords, 28th Nov. 1797.

COMPENSATION—RETENTION—BANKRUPT.—The Royal Bank of Scotland found entitled to retain stock of an insolvent proprietor, for payment of debts due to the Bank by a Company of which he was a partner, against the trustee on the bankrupt estate.

Adam Keir was a partner of Bertram, Gardner & Co., bankers in Edinburgh, who having failed in 1793, the appellant was appointed trustee on their sequestrated estates. In proceeding to make available the estate of the company, as well as of the individual partners, he found that Mr. Keir

was a stockholder in the Royal Bank of Scotland to the extent of £2000, and on proceeding to have it sold, in order that the price might form part of the fund of division among the creditors, the bank objected to the sale; and stated that no transfer could be made unless the price of the stock, when sold, were applied towards extinction of a large debt due by *Bertram, Gardner & Co.* to the bank, they being entitled to the right of retention. The present action of declarator was then brought by the appellant, to have it found and declared that the Royal Bank had no right of retention on the said stock, "but that the same do pertain" and belong to the pursuer as trustee foresaid, for behoof "of the creditors of the said *Adam Keir*." The main defences pleaded to this action were, 1. That the stock of this bank enjoyed peculiar privileges. It was of the nature of public funds, and by their charter it is declared that the shares or interest in the capital stock of the said corporation "shall not be liable to any arrestment or attachment." This clause is repeated in the subsequent charter of the bank. Another clause provides, that no person who was indebted to the bank in calls, was to be allowed to transfer their stock until such "calls" were paid. 2. That by authority given in their charter, they had a right conferred upon them of making byelaws for the government of their affairs, so that the said laws "be not contrary to the intent" and meaning of these presents, or repugnant to the laws May 31, 1737. "of the realm;" that accordingly they enacted the bye-law:—"That no proprietor who is or shall become debtor to the bank, shall be allowed to transfer his stock, or any share thereof, but in the presence of a Court of Directors, to the end each Court of Directors, if they think fit, may stop such transfer, until such proprietor find security to the bank for what he owes, to their satisfaction." 3. Independently of this bye-law, the bank had a right of retention, by the nature and constitution of their company, whether viewed under the common law of Scotland, or upon the special privileges conferred by acts of Parliament and Royal charters. In answer to this defence, it was maintained by the appellant, that neither by the common law, nor by the special powers in their charters, had the bank, as a corporate body, a lien on the stock of the individual members, to the effect of pleading retention against the right of the bankrupt member's trustee. That the bye-laws were *ultra vires* of the powers conferred by their charters: and that at all

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events the general right of retention here claimed for *all debts due* to the bank, was totally repugnant to the spirit and meaning of these charters and acts of parliament, which makes the stocks transferable to the fullest extent, without any limitation whatever, except what is contained in the said bye-law.

The Court, on report of the Lord Ordinary, on information, of this date, *sustained* the *defences*; and, on reclaiming petition, adhered.

Feb. 28, 1797.
 Mar. 11, 1797.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The bank has, at common law, no lien or right of retention over the stock belonging to the *stockholders* for debts due by them to the corporation. For these they must rank against their individual estate as creditors. It is only under their own bye-law that they can claim such a right of retention; but although the bank had, by their charters, the general power of making such bye-laws, yet it is only under condition that such “bye-laws” may not be contrary to the intent and meaning of their “charter, or repugnant to the laws of his Majesty’s realm.” But the bye-law in question, supposing in its import it gave a right of retention in the circumstances here pleaded, is unwarranted by the bank’s own charter; and also inconsistent with the transferable nature of the stock. The only case in which the charters give a right of retention to stop transfers of stock and payment of dividends, is the case where the stockholders are in arrear of calls; which must be construed to be the utmost limit to which the bank can plead their right of retention. But further, in the special circumstances of this case, even if such a right were competent to them, it cannot be pleaded, because the debt due to the bank is not a debt due by Mr. Keir, the proprietor of the stock; but a debt due by Bertram, Gardner & Co.

Pleaded by the Respondents.—At common law the bank has a right of retention, because, according to the law of Scotland, when a person is disabled by bankruptcy from discharging the obligations he owes, payment or transference cannot be demanded of any money which that other owes him, either by himself or by any one claiming in his right. The solvent person is entitled to compensate, and retain for his payment and security, any effects of the bankrupt legally placed in possession within the statutory period. Nor is there any distinction in this respect between a private copartnership and a corporation. The bye-law alluded

to was quite within the spirit, meaning, and powers of the charters, and is at once decisive of this question. It is not pretended that Mr. Keir was ignorant of this regulation; and that ever since 1728 it had been acted on without question or dispute. He must have bought his stock in the full knowledge that its transference was subject to this regulation; and the bank advanced him money on the faith that the stock was pledged for its repayment. The creditors of Mr. Keir, therefore, can have no better right than Mr. Keir himself, and must take it *tantum et tale* as in him. The bank's power to make such bye-law is not the least shaken by a right of retention being given in special cases, because such special cases are often inserted *ob majorem cautelam*, so as to apply to cases where the right might not otherwise be pleadable. But as the charters confer general powers to make bye-laws for the good of the Company; and as they expressly declare the stock not affectable by the diligence of arrestment or attachment, it is obvious that the right of creditors in regard to this stock was limited: and that the bye-law, when enacted, fell within the intent and meaning of the charters so limiting the rights of creditors.

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After hearing counsel, it was

Ordered and adjudged that the said interlocutors be affirmed.

For the Appellant, *W. Grant, Wm. Adam, John Clerk.*

For the Respondents, *Sir J. Scott, W. Alexander.*

MRS. SARAH AGLIONBY, otherwise LOWTHIAN, } *Appellant;*
Widow of Richard Lowthian, .
GEORGE ROSS, Nephew and Heir-at-law of } *Respondents.*
Richard Lowthian, and his Trustees, }

House of Lords, 15th Dec. 1797.

WIDOW'S TERCE—JUS RELICTÆ—HERITABLE OR MOVEABLE.—(1.)

A husband, before his death, having estates both in England and Scotland, executed a series of deeds, by which he left his wife the English estate, and also the liferent of one of the Scotch estates, &c. In a claim made by her for her widow's terce: Held, that the act 1681 did not refer to unilateral deeds, but to contracts of marriage, or other such deeds of a conventional nature, to which both husband and wife are consenting parties; and therefore she was not barred from claiming her terce and *jus relictæ* as well as the provisions so left her. (2.) The deceased having purchased an estate,

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and become bound to pay all the seller's debts, many of which were heritable constituted, (he having been previously bound by bond along with the seller for those debts) the question was, Whether this obligation was personal, and fell to be deducted in estimating the widow's *jus relictæ*: Held that the obligation was moveable in its nature, and fell to be deducted in estimating the moveable estate.

Mr. Lowthian, who was a Scotsman, and domiciled in Scotland, died there possessed of considerable estates both in Scotland and England. Previous to his death he executed a series of deeds intended to settle his Scotch estates, and disposed them in favour of his wife, the appellant. He at same time, by separate deeds, settled on her certain of his estates in England. The deeds in regard to the Scotch estates, were made the subject of a reduction by the respondent, the heir-at-law, on the ground of incapacity, and nullities in their execution; and after considerable litigation, which ended in an appeal to the House of Lords, the deeds were set aside and reduced.

This reduction did not affect her right to the liferent of the estate of Nineholm in Scotland, left her by a deed granted by her husband, which was left entire to her. She was also left, by separate deed, his whole plate and household furniture, and by this settlement the devise also of the English estate.

The respondents then brought an action of count and reckoning against her, to make her account for her intrusions with the rents, and her management of the estates. In answer to this claim she insisted: 1. That she was entitled to the rents of the English estates devised to her by her husband's will, this not being reduced, and being irreducible. 2. That she was also entitled to a third part of the rents of the real estate in Scotland in which her husband died infest, as the widow's terce. 3. Also to the half, or relict's part (there being no children) of her husband's free moveables, after deducting debts considered moveable. The respondents contended that the appellant was not entitled both to the English estates, and also to claim her terce over the Scotch estates. That she was only entitled to the one or the other, and not to both; and was bound to make her election; and founded on the Scotch act of parliament 1681, c. 10, enacting that a widow *shall be excluded from her terce*, where the husband has granted to her a particular provision "by a contract of marriage or other writ before "or after marriage, unless it be expressly provided in the

“ contract of marriage or other writ containing the said pro-
 “ vision, that the wife shall have right to a terce over and
 “ above the particular provision conceived in her favour.”
 He admitted that she has a right to the half of the move-
 ables, but there fell to be deducted from these a debt which
 was moveable in its nature, namely, arising from an obliga-
 tion on the part of the late Mr. Lowthian to purchase the
 late Mr. George Mackenzie’s estate, and with the price
 thereof pay all George Mackenzie’s debts, as well as those
 for which he was otherwise bound for him to his creditors.
 In answer to this last claim of deduction, the appellant con-
 tended that the debts alluded to were not moveable, and so
 could not diminish the relict’s part.

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Of this date, the Lord Ordinary, (LORD JUSTICE CLERK) May 21, 1796.
 pronounced this interlocutor, “ Finds, that in order to bar
 “ a claim to the terce, it is not necessary that the conven-
 “ tional provision should be constituted over lands in Scot-
 “ land: Finds it acknowledged, that the defender is pos-
 “ sessed of a settlement made by her husband, in her fa-
 “ vour, of an estate belonging to him in England: And in
 “ respect it is not alleged by the defender that any other
 “ person is in possession of that estate, or competing with
 “ her for it, or that she herself is not in possession of it, in
 “ terms of her said settlement; and further, in respect that
 “ she does not offer to convey her right to that estate in
 “ favour of the pursuers, or even to repudiate her hus-
 “ band’s settlement thereof: Finds, that she is not entitled
 “ to claim a terce out of the lands in Scotland: Finds, that
 “ the obligation granted by Mr. Lowthian to the trustees
 “ of George Mackenzie, for the price of the estate of Nether-
 “ wood, and debts owing by George Mackenzie, being of a
 “ moveable nature, must affect the *jus relictæ*; and, there-
 “ fore, upon the whole, refuses the desire of the represen-
 “ tation, adheres to the former interlocutor, and discharges Jan. 20, 1797.
 “ any more representations.” On two separate reclaiming
 petitions the Court adhered. *

Feb. 9, —

• Opinions of Judges :—

LORD PRESIDENT CAMPBELL said—

“ This is a question upon the construction of the act 1681. The
 terms of the act are general, including conventional provisions of
 whatever kind; 2d. point, The interlocutor is also right, the obliga-
 tion by Mr. Lothian being merely personal. He purchased the
 lands at a certain price, and also obliged himself to pay all Mr.
 Mackenzie’s debts, he being put in possession of all his funds.

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Against these interlocutors the present appeal was brought. *Pleaded by the Appellant.*—Neither by the common law, nor by the statute, nor by the intention of the deceased, is the appellant debarred from taking both the lands devised to her in England, and her terce over the lands in Scotland, because the rule, that one who takes under a will cannot set up a claim in contradiction to what is either expressed or implied in that will, does not apply here. That rule is always founded on a presumed intention of the donor to give only one or the other, unless a clear contrary intention to give both expressly appear. Now, this contrary intention is precisely what appears in this case. The intention of Mr. Lowthian to give his wife at least much more than a terce of his Scotch estates, *besides the land in England*, is demonstrable in all his deeds. And the question comes to be, how far the act 1681, c. 10, nullifies that intention, and debars her from claiming her legal terce out of the lands in Scotland, by the devise to her of certain lands in England, made by her husband's last will. On a sound construction of the statute, the "provision" therein referred to, does not refer to deeds of a testamentary and unilateral nature. It refers only to provisions conferred by "*contract of marriage, or other writ before or after marriage,*" thereby comprehending only those deeds, *inter vivos*, to which *both husband and wife* are consenting parties. It is to mutual deeds to which both parties consent, and which are only of a conventional nature, that the act seems to point at. The preamble sets forth, "That sometimes, through the ignorance and inadvertence of writers and notaries, clauses are inserted in *contracts of marriage*, containing provisions by husbands in favour of their wives, without mentioning the terce that is due to her by law, or expressing the provision to be granted in satisfaction of the terce, whereby occasion is given to relicts to claim a terce out of their husband's estates, over and above the provision," &c. This whole preamble, then, refers to *conventional provisions*. In other words, those made by writings or contracts, to which both husband and wife are parties. It is true, that the enacting clause of the statute is broader in its terms, in using words such as these,—"*That in time coming, where there shall be a particular provision granted by a husband*

"On the first point, Court unanimously for adhering. 2nd point, Lord Justice Clerk said, The obligation for price clearly personal." President Campbell's Session Papers, vol. lxxxiii.

“ in favour of his wife, either in a contract of marriage or
 “ some other writ before or after marriage, the wife shall be
 “ thereby excluded from a terce out of any lands or annual
 “ rents belonging to her husband, unless it be expressly
 “ provided in the contract of marriage, or other writ con-
 “ taining the said provision, that the wife shall have right
 “ to a terce over and above the particular provision con-
 “ ceived in her favour.” But still it is obvious, that the
 “ other writs” alluded to are such deeds to which the wife
 is a party ; for otherwise, unless this were held to be the
 construction of the act, the husband might cut off her claim
 of terce by providing her with the most illusory provision
 imaginable—a jewel, a ring, or a trinket, might suffice, and
 be called a provision in the sense of the act. The act,
 therefore, relates to grants of the nature of an annuity or
 jointure, to which both parties consent. This construction
 is farther supported by the rule in law, that when general
 words are subjoined to an enumeration of particulars, it can-
 not be extended to things of a different description. The
 words are, “ a contract of marriage, or some other writ,
 “ BEFORE or *after* marriage ;” and the particular specified
 being a contract of marriage, the general words, “ some
 other writ,” must be understood to signify other writs of the
 same nature, importing a contract or agreement between
 the parties. Besides, the preamble states, that sometimes,
 through the ignorance or inadvertency of the writer, certain
 things were done “ contrary to the meaning and intention
 “ of the *parties contractors* ;” from all which it was clear
 that the act only refers to a provision settled between the
 parties during their lives, by contract or mutual agreement,
 binding on both. 2d. But even supposing it to apply to
 unilateral deeds, such as wills, even then the statute could
 not debar her from her terce, because, in conveying to her
 the English estate, it is conveyed to her in exact words of
 the statute, over and above the lands left to her by the
 Scotch deed. 3d. Besides, the exclusion of the terce, im-
 plied in the grant, or at least in the acceptance of a con-
 ventional provision, being founded upon a statutory regulation
 of the municipal law of Scotland, is ineffectual beyond the
 territory of the legislature which enacted it, and cannot be
 applied to a landed estate in England or any foreign coun-
 try. The framers of the act 1681, had in view nothing but
Scots deeds and *Scots* property, as is evidenced by the words
 of the preamble, as well as the enacting clause of the act.

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It refers expressly to *terce*, which is a legal provision only applicable to Scotland, and to lands in Scotland, and consequently the statute cannot be extended to provisions out of lands in England, or any other country, because the enactment, from its whole scope and tenor, was not so intended to be so extended. The rules in the law of England are the very reverse of those in Scotland, in regard to such provisions. In order that a jointure, settled on a wife, may exclude from her dower, it must be particularly expressed to be in satisfaction of her whole dower; but according to the Scots statute, the provision excludes her from her *terce*, unless the deed bears that she is to have the *terce* also. A voluntary provision to a wife out of English lands, by an English deed, can never be held to be the provision to which the Scots act applies

Jus relictæ.

Mr. Lowthian took upon himself the payment of George Mackenzie's debts, some of which were clearly heritable by constitution; but he undertook this obligation as connected with the purchase of his estate.—“I hereby agree to become purchaser thereof, at twenty-five years' purchase of the present free rental of those subjects. And as I have already agreed to make payment of all Mr. Mackenzie's debts, *I expect to be put in possession of all his funds*, and shall oblige myself to hold you indemnified from all challenge at the instance of any of my heirs,” &c. If he had substituted his own obligation to the creditors for those debts, then the obligation would have been moveable; but as this obligation is undertaken to third parties, M'Kenzie's trustees, he was put under the same obligation as M'Kenzie was, which was confessedly heritable, and therefore this obligation ought not to affect the *jus relictæ*.

Pleaded by the Respondents.—*Terce.* The preamble and enacting clause of the statute, quoted by the appellant, are so clear, that there is neither occasion for commentary or room for construction on them. The great object of this statute was to provide against the evil of omitting to mention about the *terce*, in conferring special provisions, by which, contrary to the intention of the deceased, the widow has got often both the one and the other. But the statute now declares, that a provision to a wife shall be held to exclude the *terce*, unless it be expressly provided to her over and above her *terce*. And there is no ground whatever for contending that this enactment has reference only to

deeds of provision in the nature of contracts, and to which the wife is a party. The terms of the act are general, "where there shall be a *particular* provision granted by a husband in favour of his wife, either in a contract of marriage, or some other writ, *before or after* marriage." The leading feature, and chief object in the act is therefore to correct the omission in men of business neglecting to insert an express exclusion of the terce; and it equally applies to provisions when given by way of mutual contract, or in the way of an unilateral donation. This is the fair construction of the statute. The widow has her election which to take, and thus law does full justice to her. 2. There is no clause in any of the deeds giving the appellant a right to terce over and above the conventional provisions. And it is no evidence of this, that after settling his whole Scots estates on her, he settled the English estates in addition thereto, because the whole deeds as to the Scotch estate being now reduced, must be looked at, and considered as not the deeds of Mr. Lowthian. Of the contents of these he knew nothing. The import was carefully concealed from him; and he did not know in whose name and for whose behoof they were executed. 3. The respondents do not maintain that the act of Parliament can regulate estates in England. The judgment of the Court of Session does not trench on that principle. The interlocutor only finds that the widow, having accepted a conventional provision, could not claim her terce in Scotland. The act does not make any distinction as to how, where, and from what source the provision is payable. It does not confine it to estates or funds in Scotland. The act says nothing about estates in England. And the Court, not looking to the source from which the conventional provision was payable, but to the fact that it was a provision, they determined solely upon the heritable right claimed by the widow to her terce in Scotland.

Jus Relictæ.

The obligation to pay George M'Kenzie's debts was no doubt connected with an obligation to pay the price of his lands, but an obligation to pay the price of his lands, undertaken to his trustees, and out of the proceeds to pay all his debts, so far as it would go, and all others, in so far as he was otherwise bound, was a personal obligation. In so far, therefore, as those debts were not all paid at the time of Mr. Lowthian's death, it follows, as a consequence of this personal obligation, that they attach to the personal estate.

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The obligation to pay the price of the estate to George M'Kenzie's creditors was undoubtedly personal as to Mr. Lowthian, and fell therefore against his personal estate, without respect to whether there were some of the debts due to creditors heritable or not; because all obligations for sums of money are *sua natura* moveable, unless constituted by heritable bond, which Mr. Lowthian's obligation was not.

LORD CHANCELLOR LOUGHBOROUGH said,—

“MY LORDS,

“This cause is of some importance in the law of Scotland, and deserving of your Lordships' attention. It contains two principal questions, 1st, Whether an estate in Cumberland, devised by the will of Mr. Lowthian to his wife in fee, is a bar to her claiming terce or dower out of his real estate in Scotland? And if it be not a bar, whether it shall not put the widow to her election, either to renounce the terce or the estate? I state it in this double point of view; because there was some confusion in the Court below, in distinguishing whether the taking the estate did bar the terce, or put the widow to her election.

“The second question is, Whether a debt, or certain debts, owing by Mr. Lowthian, are to be deducted from the widow's half of his personal estate, in a due proportion; or whether the same shall fall solely on his next of kin. Of these there were two classes, one for the price of an estate bought from the trustees of George Mackenzie; and the other, the debts due by Mackenzie, which Mr. Lowthian became bound jointly with him to discharge; but I make no distinction between these two classes.

“On the first point, Whether the devise of a real estate in England be a bar to terce in Scotland? I shall submit to your Lordships a few short observations, on what I have observed in the law of Scotland with regard to terce. By the decisions, previous to the act of Parliament 1681, it was held that a provision, to a wife of the life-rent of a great part of her husband's estate, did not bar her terce as to the remainder; nor is this rule remarkable, for the same prevails in this country. In 1681, a case occurred, reported by Fountainhall, which brought this rule into question; a gentleman, in his contract of marriage, provided his wife to a jointure of a moiety of his real estate, and she afterwards claimed her dower out of the remainder. Sir George Mackenzie mentions that this case was *referred* from the Session to the Parliament; *that* was an inaccuracy of expression; the cause was not referred to the Parliament to be tried, but only to the effect of producing an act of Parliament, which was passed, not having a retrospective effect, but providing in future that the question could only arise from the ignorance or inadvertence of

agents. It was therefore enacted (1681) that the provisions made by contract on a wife, before or after marriage, should be a bar to the terce, where the settlement had said nothing to the contrary.

“ All the text authorities in the law of Scotland agree, and the language of the law, calling this a *conventional* provision, and the words used in the pleadings in the cause, evince the sense of the statute, and describe the bar of dower as by *conventional*, not by *revocable* provisions. Wherever the act applies, it is compulsory, and imperative, and no election is given. *That* is the bar uniformly described to which the act applies a compulsory effect; The widow cannot set aside *conventional* provisions; but, in the case of a provision after marriage, *which can be set aside*, the wife is not barred from her terce; but if she claim it, she cannot take both, and may be put upon her election.

“ This was the effect, and the whole effect, of the act 1681; it removed former prejudices, and restored a liberty to the courts to consider whether provisions revocable, or revocable *sub modo*, should not put the widow to accept the legal provisions, or renounce them. No doubt is held that provisions out of land by deed, voluntary or properly revocable, *might* put the widow to her election; provisions out of personal estate by will might do the same. Beyond all controversy, express words in a deed would do this, or if there were a presumption that the will of the grantor was such, the widow might be put to her election.

“ With respect to Mr. Lowthian's will, no ground of presumption appears, that, by a devise in fee of an estate in England, he meant to bar the appellant's dower out of his Scots estates. I lay no stress on the circumstance of its being an English estate. A life-interest in an estate in England, or out of money in the funds, might put her to her election; but, in the case of the grant of an estate in Scotland, *if in fee*, I should hold it no bar to terce or reason to go to election; *if in life* it would be different. It is a strong feature in the present case, that this plea is only set up against the terce, and that the widow has a great interest in the personal estate as relict; if Mr. Lowthian had meant to exhaust his bounty by the devise of the estate, he would have provided that the *jus relictæ* should be cut off as well as the terce. There occurs one observation more upon this point. I find, in reading the will, a strong circumstance against presuming that Mr. Lowthian meant to restrict his widow to the will; he there refers to certain deeds which he mentions to have executed. In the pleadings, there was a see-saw sort of argument upon this point; that these deeds were set aside on account of fraud or circumvention, and that they were not the deeds of Mr. Lowthian; but whenever an heir-at-law does not set aside a will, he is bound to admit it altogether, and he cannot cut and carve upon it; it must be held a sound will, and the testator as of competent understanding. At the beginning of this will, there is no appearance of restriction

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on the widow. I am therefore for reversing the interlocutors of the Court upon this point.

“ On the 2nd point, though I agree with the judgment of the Court ; yet, as a very able and ingenious argument was maintained by the appellant, I am called upon to say something on the subject. 1st. Undoubtedly I must feel touched also, as stated by Mr. Grant, with the unanimous decision of the Court on a point of Scots law ; but, 2nd. I do not go upon that only, but upon the principle of the decision, which appears to me to be right.

“ Mr. Lowthian was bound in several debts of George Mackenzie's, which fell to be paid by his next of kin ; but they would have been entitled to be reimbursed out of the estate of Mackenzie ; as the widow did not lose by the *active* debts ; so she ought not to gain by the *passive* debts.

“ Mr. Lowthian was the arbiter of his own succession, as to what should be heritable or moveable, and his heirs who succeed *ex lege* must take it as they find it. What is it that he has therefore done ? He was bound to pay Mackenzie's debts, but he had a right of relief against his estate ; he anticipates that, by taking the estate with the charge of all Mackenzie's debts, which he personally undertakes to pay in an aggregate sum, not distinguishing principal from interest. But he was relieved from this obligation by Mackenzie's estate ; and he has *de facto* received from it wherewith to pay the debts.

“ The form given to this was a sale of Mackenzie's estate, at twenty-five years purchase, *ultra* all debts affecting it, which Mr. Lowthian undertook to pay. To Mackenzie's representatives, therefore, he was only liable for the price of the estate (£28,000) at twenty-five years' purchase, and an unliquidated amount of debts ; and he was not to be discharged of his obligation till *all* the debts were paid. It was therefore merely a purchase of lands, for an undefined sum, which Mr. Lowthian made ; and as the widow will be entitled to her terce out of the lands, it seems just that those debts which formed the price of the lands should be deducted out of the *jus relictæ*.”

I therefore move, that it be

Ordered and adjudged, that the interlocutor of the Lord Ordinary, of 5th February 1796, in so far as it finds, That in respect Mrs. Lowthian has accepted of a provision of an estate in England, that she is not entitled to claim a terce out of the lands in Scotland ; and the interlocutor of the Lord Ordinary, of the 21st May 1796, in as far as it finds, That in respect it is not alleged by the defender that any other person is in possession of that estate, or competing with her for it, or that she herself is not in possession of it in terms of

her husband's settlement; and in respect that she does not offer to convey her right to that estate in favour of the pursuers, or even to repudiate her husband's settlement thereof, therefore that she is not entitled to claim a terce out of the lands in Scotland; and the interlocutors of the Lords of Session, of the 20th January and 9th of February 1797, in so far as they adhere to the parts of the Lord Ordinary's interlocutor above mentioned, be, and the same is hereby *reversed*; and it is hereby declared, that the appellant, Mrs. Lowthian, is not bound to give up the benefit of the devise to her by the will of the 12th October 1782, and codicil thereto of her husband, before she can be admitted to the possession of her terce out of the lands in Scotland: And it is further ordered and adjudged, that the rest of the said several interlocutors be affirmed.

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For Appellant, *Sir John Scott, M. Ross, Wm. Tait.*

For Respondents, *W. Grant, Geo. Ferguson.*

[Bargany Cause.]

SIR HEW HAMILTON DALRYMPLE of Bargany	}	<i>Appellant ;</i>
and North Berwick,		
MRS. FULLERTON and HUSBAND,		<i>Respondents.</i>

House of Lords, 18th Dec. 1797.

ENTAIL—CONTRAVENTION—PRESCRIPTIVE RIGHT—MINORITY.—

A party was said to have contravened the prohibitions of an entail, and to have made up titles not under the entail, but otherwise, upon which he possessed unchallenged by the next substitute heir of entail for more than forty years. In a question with an heir-substitute, who was a minor at the time this contravention took place, Held in the Court of Session, *that in this case*, in computing the period of prescription, the period of the substitute-heir of entail's minority was to be deducted, and therefore that there was no sufficient title to exclude. On appeal to the House of Lords, the case was remitted, with an instruction to the Court of Session to review their interlocutor. And opinion indicated, that if the pursuer could establish that she was in the situation of next heir-substitute of entail, that she might plead her minority.

Mr. John Hamilton, otherwise Dalrymple, *second* son procreated between Sir Robert Dalrymple of Castletown, and Joanna Hamilton, only daughter of John, Master of

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 &c.
 July 26, 1742.

Bargany, obtained from the Crown a charter of resignation of the barony and lands of Bargany, limiting the succession to the heirs whatsoever of his body; whom failing, to the other heirs whatsoever of the body of Joanna Hamilton, his mother, without division; whom failing, to the other heirs female of the body of the deceased John Lord Bargany, &c. Upon this charter sasine followed, and Mr. Hamilton possessed the estate of Bargany on this title for fifty years, thereby acquiring an unchallengeable prescriptive right. On failure of heirs of his body, the succession by the above charter, devolved on the appellant, under the description of nearest heir whatsoever of the body of Joanna Hamilton.

Prior to this deed in 1742 the lands stood devised thus :
 June 1688. In the year 1688, Lord Bargany had executed a deed of entail, by which the succession to his estate was limited to his eldest son John, Master of Bargany, and the heirs male of his body; whom failing, to William his second son, and the heirs male of his body; whom failing, to the heirs male to be procreated of his own body; whom failing, to the eldest heir-female of his own body, and the descendants of her body without division; whom failing, to the next heir-female to be procreated, &c.

This deed contained a condition, that the heirs of entail should use and bear the surname, arms, and designation of Hamilton of Bargany, but without any prohibition to use any other name or designation *along with it*; and it also contained the usual irritant and resolute clauses against contracting debt, selling the estate, or altering the course of succession which it prescribed.

John, Master of Bargany, the institute in this entail, died before his father in 1709, leaving an only daughter, Joanna,
 1707. who, in 1707, had been married to Sir Robert Dalrymple of Castletown, eldest son of Sir Hew Dalrymple of North Berwick, Bart., Lord President of the Court of Session. Under the limitation in the entail, William, afterwards Lord Bargany, succeeded to the deceased, and was accordingly served heir of tailzie and provision in general to John, Master of Bargany.

William, Lord Bargany, died in 1712, leaving one son, James, and a daughter, Grizel, afterwards married to Thomas Buchan of Cairnbulg. James became Lord Bargany, was served heir of tailzie and provision in general to his father, and, dying in 1737, without issue, in him ended the male succession of John Lord Bargany, the maker of the entail.

Upon this event, a question arose, who was entitled next

to succeed by entail under the description of eldest heir-female of the body of John Lord Bargany. In this competition, the claimants were the late Sir Hew Dalrymple of North Berwick, the appellant's father, and eldest son of the marriage between Joanna Hamilton and Sir Hew Dalrymple of Castletown; Sir Alexander Hope of Kerse, eldest son of Nicholas Hamilton, only daughter of John Lord Bargany; and Mary Buchan, daughter of Grizel Hamilton, only daughter of William Lord Bargany. By judgment of your Lordships, it was decided that "The estate of Bargany did descend to Sir Hew Dalrymple, eldest son of the daughter, and only child of John, Master of Bargany, and that he ought to be served heir of tailzie and provision to the late James, Lord Bargany."

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March 1739.

Sir Robert Dalrymple was the eldest son of Sir Hew Dalrymple of North Berwick, (Lord President of the Court of Session). By an entail executed by his father, (the said Hew), he settled his estate of North Berwick on the heirs male of his son, Sir Robert Dalrymple's marriage with Joanna Hamilton, with a proviso, that if at any future period the estate of Bargany should devolve upon the heir male of that marriage, in that case, by accepting the succession to Bargany, the heir should forfeit his right to the estate of North Berwick; reserving ample powers to discharge or qualify the whole, or any part of the prohibitory or irritant clauses. Sir Robert Dalrymple died in 1734, leaving three sons, Hew Dalrymple, afterwards Sir Hew Dalrymple the eldest, the father of the appellant John Dalrymple (afterwards called Hamilton) the second, and Robert, the third son, who died without issue; and two daughters, Marion, grandmother of the respondent, and Elizabeth, deceased.

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Sir Robert Dalrymple's father, the maker of the entail of North Berwick, being still alive, when his son died, having survived him for many years, he seemed to have altered his views as to preserving a separate representation in his family, for, by deed of this date, he declared that the non-inserting the said clauses relating to the estate of Bargany, in his grandson's service, as heir of tailzie, *should not infer any irritancy against him.*

Nov. 1, 1734.

On his death, his grandson succeeded, became Sir Hew Dalrymple, and served heir in special, and was feudally invested with the estate of North Berwick, free of any limitation or restraint to prevent him or his descendants from holding it and the estate of Bargany together, and under

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1797. this title he possessed for fifty-six years, until his death in 1790, when the appellant, his son, succeeded.
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&c. Before his death, and in 1739, the succession to the Bargany estates had opened ; and in the competition which arose thereon, he, Sir Hew Dalrymple, was preferred as the descendant of the body of Joanna Hamilton, under the destination in the entail of that estate of 1688. Although he was thus successful, yet he never made up titles ; and afterwards by a deed, reciting the two entails of Bargany and
- Aug. 1740. North Berwick, “ he repudiated and refused to accept of the succession to the estate of Bargany,” in favour of John Hamilton, otherwise Dalrymple, the next heir of tailzie, and “ consented ” that he should make up titles to the same. Accordingly, the crown charter and infestment in
1742. 1742, above referred to, was expedite by Mr. Hamilton. This charter ran as follow : “ Dilecto nostro Joanni Hamilton de
“ Barganie, jurisconsulto, filio secundo demortui Domini Roberti de Castletown procreat, inter illum et demortuam
“ Dominam Joanna Hamilton unicum filiam demortui Joannis
“ Magistri de Barganie et sic hæredum femellam demortui
“ Joannis Domini Barganie, ejus avi et hæredibus quibus-
“ cunque ex corpore dict. Joannis Hamilton ; quibus deficientibus alijs hæredibus quibuscunque ex corpore dict. Dominæ
“ Joannæ Hamilton procreat inter illam et dict. Dominum
“ Robertum Dalrymple absque divisione ; quibus deficientibus alijus hæredibus femellis ex corpore dict. Joannis Domini
“ Barganie absque divisione,” &c. Then followed the strict prohibitory irritant and resolute clauses, with limitations precisely similar to the original tailzie of Bargany.
1780. In 1780, Mr. Hamilton, in contravention of the entail 1688, executed a disposition of the estate of Bargany, by which he disposed the same to himself and the heirs of his body, “ whom failing, to Sir Hew Dalrymple, Bart., and the
“ heirs of his body, without division, whom failing, to the next
“ heir of the body of the said John Lord Bargany, and the
“ other heirs of entail, contained in the entail of 1688, executed by the said Lord John Bargany,” and infestment was taken upon by this disposition.
- Upon the above charter, 1742, Mr. Hamilton enjoyed the estate, without challenge, for forty years, until the respondent brought, as above set forth, the present reduction and declarator against the late Mr. John Hamilton (who died during the action) and the appellant.
- This action was founded on the contravention of the entail, as to the Bargany estate, in the person of Sir

Hew Dalrymple, and set forth, that after having made up titles to North Berwick, he had succeeded to the Bargany estate; that he had assumed the surname of Hamilton of Bargany, and had entered into possession by intromitting with the rents; that he had afterwards repudiated the succession in favour of his younger brother, Mr. Hamilton, by which he attempted to alter the order of succession; that John Hamilton had accepted the estate, and made up titles in the character of nearest heir-male of John Lord Bargany, which he could not be, so long as his elder brother was alive; and that both Sir Hew and his brother, Mr. Hamilton, had therefore contravened and forfeited for themselves and the issue of their bodies, the said estate of Bargany, leaving the succession open to the respondent as next substitute, and nearest heir of Joanna Hamilton. The action, therefore, contained a declarator of irritancy against all prior substitutes under the entail 1688.

In defence against this action, the appellant produced his charter of 1742, and sasine thereon, as a prescriptive title to exclude. Against this title to exclude, it was pleaded, 1st, That the charter and sasine were themselves brought under reduction. 2d, That this investiture was not secured by the positive prescription, because of its interruption by Mrs. Fullerton's minority from 1768 to 1784.

The case, then, resolved itself into the question of prescription, and whether that prescription had been interrupted by Mrs. Fullerton's minority? Opposed to this plea of interruption of prescription, two grounds were taken: 1st, That the years of minority do *not in any case* form a deduction from the *positive* prescription; 2d, That even admitting the contrary, yet that substitute heirs of entail were not entitled to plead minority.

The Lord Justice Clerk, Ordinary, found, " That in com- Mar.11, 1795.
 " putting the period of prescription, the years of the pursu-
 " er's minority are not to be deducted; and in respect that
 " the charter and sasine 1742 are *ex facie* unexceptionable,
 " and that no nullity or objection does from thence appear
 " to lie against them; and that it is averred by the defend-
 " er, and not denied by the pursuers, that the defender has,
 " in virtue of that investiture, possessed the estate of Bar-
 " gany from the date thereof to the commencement of this
 " action, without any challenge or interruption, finds that
 " the defender's right to the estate is secured to him by the
 " positive prescription, and that he is entitled to hold and
 " possess the estate, under the foresaid investiture, in time

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1797. " coming, and that the same is sufficient to exclude the title
 ————— " of the pursuers in the reduction ; and therefore alters the
 DALRYMPLE " former interlocutor, and assoilzies from the reduction ; re-
 v. " serving to pursuers to insist in the declaratory conclusions
 FULLERTON, " of their libel ; and particularly how far the tailzie 1688 is
 &c. " affected by the investiture 1742, and whether or not the
 " defender has incurred any irritancy under the entail ;
 " And as the cause has been very fully stated on both sides,
 " the Lord Ordinary discharges any representation to be
 " received, and decerns."

Feb. 9, 1796. On reclaiming petition the Court, of this date, altered,
 and found, " that *in this case*, in computing the period of
 " prescription, the years of the pursuer's minority are to be
 " deducted, and therefore that the defender has not pro-
 " duced a sufficient title to exclude, and remit to the Lord
 " Ordinary to proceed accordingly." And, on a second re-
 Dec. 6, 1796. claiming petition, the Court adhered.

Against these interlocutors the present appeal was brought
 to the House of Lords.

Pleaded for the Appellant.—1. Minority does not in any
 case suspend the course of the positive prescription of land
 rights. It only operates as an exception to the negative
 prescription. The deduction of the years of minority would
 be totally inconsistent with the peculiar nature of the posi-
 tive prescription, as understood in the law of Scotland, con-
 tradictory to the just construction of the act of Parliament
 1617, c. 12, as well as to the statutory views of the legisla-
 ture in framing that statute, and subversive of the security
 to land rights thereby intended to be protected. 2. But,
 assuming that minority interrupted both the positive as well
 as the negative prescription in the act 1617, it does not ap-
 ply to the case of a *substitute* heir of entail, challenging
 after the lapse of forty years. This was decided in the case
 of Macdougall of Mackerston in the year 1739, and by the
 case of Monypenny in the House of Lords in 1757, which
 decisions rest upon the principle that there is an essential
 distinction between the case of substitute heirs of entail,
 (each of whom has a vested right of action to support the
 entail, which he may exercise at any time), and the common
 case, where the right of action is confined to the individual
 immediately entitled to succeed and injured by the intrusion.
 The same principle and distinction, taken not from ideas
 of expediency conceived by the courts of law, in opposition
 to the words and spirit of the statute, but upon a fair and just

construction of that law, and upon the reason of it, which was to quiet men in their possession after the period of forty years, was again recognised in the case of Gordon v. Gordon in 1784, and by the House of Lords in the case of Auchindachy. The result of all which decisions establishes this position, that according to the construction of the act 1617, when a person has possessed for forty years upon a charter and sasine *ex facie* good, and one of full age, under no legal disability, and entitled to possess, has for that period neglected to make his claim, or assert that title, the actual possessor is not thereafter to be disquieted, or the title on which he actually possessed defeated, at the suit of posterior or collateral heirs, though such heirs were under age, or some personal disqualification, to sue during the whole, or during part of the time. The statute had in contemplation one general case, viz. that of a person in possession, under a title apparently good, but at bottom bad, or liable to challenge; the *quasi dominus sed non vere dominus*; and one out of possession, though entitled to it, the *verus dominus* or rightful owner. If the last neglects to assert his right, all who might have taken under or after him or her, suffer by this negligence. Heirs of entail stand precisely in the same predicament, with this difference, that any one of the heirs of entail, however remote, may bring their challenge at any time within the forty years, though not to the effect of attaining possession, yet to the effect of removing any bar to their possession when it shall open to them by course of descent. Their hands are not tied up by the conduct of those who stand before them in the order of succession. They may use the privilege to challenge at any time; and hence the distinction made in regard to substitute heirs of entail pleading minority. Nothing can be figured more demonstrative of the principle than this, that it is the age of the person entitled to the immediate possession, the *verus dominus*, and not the age of the substitute, or expectant heir, even the nearest, that is to be regarded in construing the statute. If it were otherwise, it is clear that such rights would never prescribe, and thus the act would be defeated. 3. Yet this difficulty was attempted to be surmounted by the creation of a puzzle, grounded on the shape of the action and the form of proceeding. Supposing Mrs. Fullerton could not set aside the exclusive or prescriptive title by pleading minority, she maintained that she was the person all along by law entitled to succeed;

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that she was the *vera domina*, against whose immediate and vested right to possess, the prescription was running, and that all the prior heirs of entail were to be held as out of the field, or *civiliter mortui*; because Sir Hew Dalrymple, the appellant, having incurred an irritancy, had thereby *ipso facto* forfeited the estate for himself and his descendants by his conditional repudiation, which was an alteration of the course of succession; and Mr. Hamilton had also forfeited, by making up his title by the charter and investitures challenged. This new argument seemed to take effect with the Court, and the interlocutors complained of are the fruit of it. It is not difficult to show where the fallacy of this argument lies. She seeks to assume, that from the moment of Sir Hew Dalrymple's giving up the estate to his brother, and Mr. Hamilton passing the charter 1742, she was the *vera domina* of the estate, *virtually in possession*, and all along has been legally, although not feudally vested in the estate. How is it possible to hold her to be rightful owner when she cannot exercise legally a single act of ownership? Can she levy the rents? Can her creditors affect the estate? Can she incur an irritancy? It does not require a feudal investiture to confer these rights: they are the legal consequences of apparency. Has she used her right as apparent heir? Besides, this idea of hers is groundless upon the statute 1685, c. 22, declaring that the right of an heir of entail in possession, who contravenes, cannot be considered as resolved or forfeited, nor any right vested in the next substitute, until decree of declarator of the irritancy be obtained. 4. Besides, the plea of minority can only relate to the negative prescription and not to the positive, the two clauses in the act as to both being separable; and the exception of minority made only to apply to the negative and not to the positive.

Pleaded for the Respondents.—1. Minority is an exception pleadable against the positive as well as against the negative prescription. The exception in the act 1617 is co-extensive with, and applies to the whole enactments of the statute, and there is nothing in the wording of the act to countenance the proposition which would confine it to the one kind and not to the other. Neither equity nor expediency can justify a construction which would limit the operation of the statute so manifestly to the disadvantage of minors, whose rights, it is reasonable to presume, were the chief object of the legislature in framing the act. Sir Geo.

Mackenzie, B. iii. tit. 7, § 15, and Stair, B. ii. tit. 12, § 18, have never drawn such a distinction, in laying down the law on the subject, and refer to minority as an exception applicable equally to the one as to the other. Mr. Erskine, B. iii. tit. 7, § 35, only says, it has been doubted whether it applies to the positive prescription, but this doubt has since been resolved; and the law on the subject has been considered as settled ever since the existence of the act. And in the case of *Blair v. Shedden*, decided in 1754, Fac. Coll., the question was solemnly argued and decided, that minority was to be deducted in counting the *positive* prescription. This law was also expressly recognized in the case of *Nicolson v. Gifford*, 11th March 1779 (unreported). It has been contended that the doctrine in Blair's case was overturned in the House of Lords, in the case of *Campbell of Otter v. Wilson*; but though pleaded at the bar, yet there is no evidence that the House of Lords went upon that ground, there being a variety of specialties in it, (*vide ante* vol. ii. p. 193), and in the subsequent case of *Gifford*, as above quoted, where the decision in the House of Lords in *Campbell of Otter* was specially pleaded, the Court of Session were satisfied that *that* judgment did not at all affect the question.

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2. The appellant, when arguing that it is matter of uncertainty whether the respondent, had she brought her declarator within the forty years of the acts of contravention, would have succeeded or not, forgets entirely that we are here in a question upon a title to exclude, in which, from the very nature of the case, it must be assumed that, had she brought her action within the forty years, she must have succeeded.

It is a mistake to say, that after the contravention was committed, the respondent had only a contingent right to the estate or *spes successionis*. Before the acts of contravention were committed, she certainly had no more than a chance to become entitled to the estate. But the moment the prior substitutes failed, or contravened the entail, she became the person to whom *de jure* the estate belonged. She had then a right to enter into possession. It is stated that Sir Hew Dalrymple, and not the respondent, was the next heir to Mr. Hamilton. It is sufficient to answer, that both contravened the entail, and by that contravention the succession opened to her; so that her plea of minority is a sufficient answer to the title to exclude.

But, 3. In regard to the plea that minority is not to be

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deducted, when pleaded by substitute heirs of entail, there seems no ground in law or reason for this distinction, or to withhold the benefit of the exception in the act from heirs of entail. Assuredly the act makes no such distinction. True, heirs of entail have no right, upon the contravention of the heir in possession, to the property of the estate, yet that can be no reason for not deducting minority when prescription is pleaded against them, for their right under the entail is still valuable, though contingent and uncertain ; and the cases of Mackerston, Kinnaldie, Whitley, and Kincaigie, referred to, as depriving substitute heirs of entail of the benefit of the plea of minority, are not adverse to the respondent's doctrine. On the contrary, they support her plea,—because, in these cases, where the question was, Whether an entail was destroyed by the negative or positive prescription ? the argument rested entirely upon the allegation that the remote substitute heirs of entail with only a *spes successionis*, had no right to found upon their own minority, or upon that of any other substitute. Even admitting the cases referred to, to have been perfectly well decided, the doctrine that she maintains stands altogether uncontradicted by those decisions. It is a false argument to say, 1st. That entails would never prescribe, because, if that is the consequence that results from the statute 1617 as to prescription, and the statute 1685 as to entails, it is the province of the legislature, not the duty of judges to interfere. 2d. It is impossible, with any justice, to liken heirs of entail to a corporation. Where is the similarity ? Heirs of entail cannot plead, or be impleaded, except as individuals. And it is impossible to figure any reason why the negligence of one heir of entail should be prejudicial to another. 3d. Although it be very true that substitute heirs of entail have no right, upon the contravention of the heir in possession, to the property of the estate, yet that can be no reason for not deducting their minority, when prescription is pleaded against them ; for their right under the entail is valuable, though contingent and uncertain. But there is nothing either in the statute 1617, or in the reason of the case, to prevent the saving clause of that act of parliament from extending to rights of that description as well as to others. The difference between the case of Mackerston and the present case, is obvious in many respects, but particularly in this most important circumstance, that Thomas and William M'Dougal, the minors, never had more than a *spes successionis* contin-

gent upon the event of their surviving their brother Henry, and of course they could never set forth that the right to the estate had devolved upon them during their minority. The Court of Session considered that circumstance as of great consequence, and accordingly the interlocutor assigns as a *ratio decidendi*, that the minorities of Thomas and William could not be deducted; in fact, the right to the estate had not devolved upon them, as is here the case. In the present case, the right to the estate of Bargany devolved upon the respondent during her minority. Had she claimed it then, immediately on her father's death, her right to it would have been declared at once. But as her minority prevented her from doing so, therefore that minority is a sufficient answer to the plea of prescription. In like manner, the case of Kinnaldie (*Ayton v. Montgomery*, 31st July 1756), it was not the minority of Thomas Ayton that was pleaded, but the minority of *prior substitutes in the entail who had failed*. In like manner, the Whiteley case, *Gordon v. Gordon*, 21st December 1784, was precisely the same with that of Mackerston; it is not so much as pretended that George Alexander Gordon, during his minority, was entitled to have raised a declarator claiming the estate as devolved on him, by irritancy or otherwise. And in the printed collection of the decision, this is mentioned by the collector as the ground upon which the judgment of the Court proceeded. Again, the Auchindachy or Kinraigie case, went on specialties—the entail there never having been recorded, could not be set up against creditors. The contravention, in the present case, although happening fifty years ago, without any declarator of irritancy being raised by the respondent, ought not to prejudice her, she being minor, and therefore not to be injured by any omission or neglect, or by any possession held against her during her minority. And deducting those years of minority, it is an admitted fact that the years of prescription are not run upon the charter and infeftment 1742.

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Vide Ante.

Vide Ante.

After hearing counsel,

LORD THURLOW said,*

“ My Lords :

“ I shall not need at present to enter into all the topics in this

* These notes, together with others bound up in a volume, were most kindly presented to me by the late Lord Anderson, recently before his death ; than whom, in such questions, and of feudal law generally, none was more eminently distinguished.

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cause which were discussed at the bar ; for there are some of the points nearer and more material to the merits.

“ I have attended to the hearing of this cause with more dissatisfaction than I remember to have felt on any similar occasion. It is a lamentable thing, that, when parties are full of, and ready to argue every thing that is material in a cause, the practice of the Court of Session should be such, that, instead of the obvious and apparent merits, the Court is to go to a collateral point. With regard to the practice, I own that I am in a state of invincible ignorance ; abstractedly, I see no reason for it ; and I cannot find its source or authority in any writer of the law of Scotland ; all I can learn is, that it is the practice.

“ I shall now state to your Lordships the subject of this cause, and the several points which it contains. I wish my health had permitted me to investigate them with more accuracy, and that it had not made me forget some part of the argument which has been urged ; but I believe I have not forgot any material part of it.

“ Last century, an entail was made of an estate in Scotland, in which, as it stands, Sir Hew Dalrymple and his children are the nearest substitutes. Mrs. Fullerton, the pursuer in the present action, is the tenth substitute. When the action was brought, she, by the form of the Court, called for production of certain deeds ; because no judgment could be had in the reduction of those deeds without production. In her summons, she recited the entail, and the descent of the estate to Sir Hew Dalrymple, the appellant's father, as heir female of John, Lord Bargany, the maker of the entail. She then stated, that upon the occasion of another estate coming to Sir Hew Dalrymple (the estate of North Berwick) Sir Hew, in 1740, executed a renunciation of the estate of Bargany in favour of his brother John Dalrymple, afterwards John Hamilton, qualified thus, that upon the failure of the issue of John Hamilton, and another brother, if the tenure of the estate belonging to the Dalrymple family would permit, Sir Hew and his descendants might claim the estate.

“ This is the only instrument stated by the respondent, as giving away the estate. In consequence of it, John Hamilton brought an action, stating, that in respect of his brother's renunciation, he was entitled to serve himself heir under the entail, and take the estate. In this action, decret in his favour passed in absence, though this decree was not binding on third parties. He was by it declared next heir, and entitled to be served as such ; and he was served accordingly, and took out a charter thereon, which was followed with sasine.

“ All these alterations were antecedent to the title of the present pursuer ; her right was not diminished, nor was she barred by these deeds, from any claim which could accrue to her under the original entail. These transactions took place in 1742, and in 1793 the present action was brought, reciting the entail, stating the transactions

which had taken place, and assuming that these were contraventions. The respondent accordingly claimed the estate.

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“ To this action the defender pleaded his charter 1742, and prescription from forty years possession thereon. In reply, the respondent contended, that she had been a minor when part of the prescriptive term was current, and had remained a minor for such a number of years that the prescription was not run. The Court of Session, after some previous interlocutors to the contrary, at length allowed this plea; and this point is now brought before your Lordships upon appeal.

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“ This deduction of minority, the respondent pleaded upon the act 1617. The statute introduced the positive prescription, as it is called, into the law of Scotland; and it enlarged and corrected the negative prescription. The negative prescription, is a title in bar of all action for claiming a right after the lapse of forty years. This is the only sort of prescription known in this country; and it is the only sort known in the Roman law; the positive prescription then introduced into the law of Scotland was novel in that country, and is unknown in all others. This, instead of applying the prescription to the *person*, applied it to the *possession*, whether upon a good or bad title, and made the lapse of forty years a sufficient confirmation of it. I have considered this act 1617, with as much attention as I could; and if it had fallen upon me to decide the question, I should have held that the last clause in the act relative to the deduction of minority, had a reference only to the negative prescription; not only because the grammatical construction required such an interpretation, but because the exception is contrary to the nature of the positive prescription. But this point was decided differently a long time ago. It is not impossible to interpret the statute so as to justify that decision; and it would be dangerous to bring the matter into question now.

“ What is the effect of this decision when applied to entails? Mr. Erskine said at the bar, that they were excepted from this rule, otherwise they would never prescribe; but all difficulty is cleared by this, that every heir of entail has an independent right of action; and thus prescription will apply to him as well as to a stranger, and so I think it does. It was insisted, that it would be inconvenient to allow deduction of minority to all the substitutes in an entail: for, on account of their number, the prescription would never run. This reasoning, however, proceeds upon a mistake; for no case could occur where the prescription could run to more than sixty-one years, as every substitute has an independent cause of action, and as he must come within forty years of the original cause of action, it is not worse to allow the deduction of minority to all the substitutes than to one individual, against whom the prescription could only run for sixty-one years. If not in existence at the time of the contravention, the prescription would not begin to run till his existence. It would

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then be suspended during his minority ; and, by the statute, it is only the years of minority that fall to be deducted, which would still keep it within the limits I have mentioned.

“ Upon these grounds, I have no difficulty to say, that if this case be new, the Respondent comes in time to bring her action : but it appears, that if your Lordships were to decide the question thus, you would go beside the opinion of every judge in a learned court. The judges who were in favour of the Respondent, held her to be first substitute under the entail ; and it was avowedly upon that ground that they decided the question. The other judges held it not a matter of much moment, whether she were first or last substitute, because, in an entail, which was likened to a corporate body, a *familia*, it would run to perpetuity if the deduction of minority were allowed to any substitute heir. In support of this, the case of Maclellan’s children has been quoted, but no other case upon this point was stated at the bar. It is possible that that case may have been decided upon different grounds ; and, at all events, I have no difficulty to say, that I cannot assent to that case, as pleaded by the appellant. In that case, some difficulty occurs, by its being an undivided right in the children, which the trustee might divide ; but he was the only person who could bring an action on the bond ; and, after a lapse of forty-three years, no person could bring an action upon it. But, supposing it were true that the case was decided upon the ground of a joint right, two judges, eminent for their learning and abilities, the Lord President and the Lord Justice Clerk, state their opinions, that if one joint creditor were major during the currency of prescription, they would not allow the deductions of the minority of any of the other creditors. With regard to the family of Maclellan, it is not stated to us that the forty years had run against any of them.

“ But upon this point, I will speak my opinion openly, as I conceive it will be proper to send back the cause to be further considered by the Court of Session. It is impossible to qualify the several rights of action competent to the heirs of an entail by the idea of a *familia* or joint right. The estate is to be enjoyed separately and distinctly by a series of heirs, each in their turn, exclusive of all others ; it is distinct in its commencement, in its enjoyment, and in its conclusion. Nor is it an undivided possession. The same holds of estates tail in this country, they are neither joint in their origin, nor in their possession. I therefore hold it inadmissible, that prejudice could arise to any one heir from what happens to another.

“ The judges seem to hold, and my mind is considerably in doubt upon the subject, how far certain cases have gone to controvert what I quoted from Mr. Erskine’s book ; but it is difficult to say what ground or *ratio decidendi* prevailed in any of the four cases stated at the bar. In the case of Mackerston, as stated by Kilkerran, Thomas Macdougall took the estate in 1669, and there was no question of

his majority. In the other report of this case in *Home*, the argument runs, that as the estate was taken only in liferent in 1669, and a faculty reserved to make deeds, &c., that the faculty, when exercised in 1684, was to be drawn back to the original deed in 1669 which created it, from which period, it was contended, the prescription ought to run. But it seems too great a refinement to say, that the prescription ran from 1669. The reports of this case are defective, as they do not state the several minorities of those that were craved to be deducted. It appears that Henry, the son of Thomas, became major in 1709; consequently he was born in 1688, and the four years when he did not exist, could not be deducted from the prescription. He possessed the estate in fee simple till 1715, when he made a new settlement thereof: Titles were made up under it, after his death, in favour of his daughter; and the curators sold this estate to a gentleman of the name of Hay, in consideration of his marrying his daughter, and paying £1500 to discharge the family debts. In this case, therefore, of an unrecorded entail, the judges went out of the way to determine anything respecting the prescription; if Mr. Hay was an onerous purchaser, the entail was cut off. I should dissemble, were I not to state, in mentioning the result of all the pleadings in this cause, that the Court also went upon the notion, that it was not competent for a substitute under an entail, to found upon the minority of a prior substitute, and that he had no right to deduct his own minority, as he could, during it, have only brought an action to preserve the entail; not to claim the estate. On these points I shall only say, that it is not essential to the justice of a judgment, that the whole *rationes decidendi* be well founded in law. It would not have been competent to appeal this case because some of the *rationes decidendi* were not right, if it contained good points in it, upon which it must have been affirmed in a court of appeal.

“ In the case of Kinaldie, unless the minority of other heirs than the pursuer were deducted, it would not have saved the prescription.

“ In the case of Auchendachy, I have not a report of the decision, but it is not necessary for me to examine it; it was a matter between creditors, and has nothing to do with the present question.

“ I do not think, that upon examination, the Court will be precluded by these cases from finding, that every different heir of entail must have his own minority allowed or not allowed, as his situation may entitle him.

“ But what can your Lordships do here? Several material questions, it appears to me, must be solved before we can do any thing. 1st. Whether the present action be not *jus tertii* to the respondent, whose right under the original entail, was not prejudiced by the alleged contraventions? 2nd. Whether it be possible to qualify a forfeiture against Sir Hew for himself and his children, after his own death, there being a great difference between the competency of an action for replacing an estate under an entail, and the forfeiture of that

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estate for contravention? 3d. Whether the renunciation by Sir Hew could amount to a forfeiture for himself and issue? In the summons in the present action, that deed is called a disposition of the estate to John Hamilton *a stranger*; and the summons afterwards states the transactions of John to amount to a forfeiture, because he was *not a stranger* in the estate. If I were to agree with the majority of the Court, in the present question, that the respondent is in the situation of a person who could obtain a decree to serve heir, I could not learn how this conclusion was to be drawn. This plea, which was set up by the defender, goes to a bar of the pursuer's action; and if the summons, and what is there stated, do not bear out the action, the plea is nonsense. According to the interpretation of the majority of the judges, Mrs. Fullerton is only entitled to deduct her minority *hac ratione*, because she is first substitute; but how do they know this? What *termini habilis* have they for their opinion? It was said, if I understand the argument aright, that what she has alleged as to her title to call for production of the papers must be considered as waved; and that the defender, by putting in his plea, must be considered as an *actor pro hac vice*. But there was no way to learn whether she was first substitute or not, but because she had stated so in her summons; and no doubt, if she had stated a sufficient title, she would have a right to call for production. But all this remains, as I have already stated it, and the Court must have pronounced that she is first substitute in order to apply *termini habiles* to their judgment; and at sametime it appears from the judgment itself, that the consideration of that matter has hitherto been rejected. But I am not prepared to pronounce that the respondent is first substitute, without first pronouncing that the matter of her libel makes her so. The consideration of this point has hitherto been much waved, as I said before. Mr. Erskine contended at the bar, that we must take the judgment as it stood, and that we might go to the consideration of that proposition, whether she be first substitute or not. I, however, remember a rule upon *that* subject, which was laid down by these eminent characters, Lord Hardwicke and Lord Mansfield, when they sat in this House. They would not pronounce judgment on any point not already discussed in the Court below; and they considered the province of a Court of appeal to be, to say whether the judgment was right or wrong upon what had passed in the cause.

“ I should think it wrong in the present case, for a Court of appeal to enter into this point, especially as it relates to the law of Scotland, with which your Lordships are not so intimately acquainted. I should think it the safest mode, to remit the matter to the Court of Session, to have it fairly stated and discussed, before being drawn to a determination upon it.”

LORD CHANCELLOR LOUGHBOROUGH.—“ The noble and learned Lord has so effectually disentangled this cause from the difficulty

in which it was involved, that nothing remains for me, but to express my acknowledgments for his accuracy in resolving my doubts.

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“ I too feel the impossibility of coming to any decision upon this cause, as we cannot follow up the *ratio decidendi*, nor find upon what state of the case the conclusion assumed as true was drawn. Both parties have seemed to consider this question as a simple proposition ; but the opinions of the judges, for or against either party, all clearly evince that this is not a simple but a complicated proposition. On the point upon which a determination has taken place, one part of the judges contend that the minority of no substitute heir of entail was to be deducted ; on the other side this was not denied ; but the judges took a distinction, that the first substitute after the persons contravening, was entitled to deduction of the minority ; and they assumed that Mrs. Fullerton is such first substitute. It is obvious however, that she is not in that order under the entail.

“ In an action of declarator, it is not in general necessary to enter further into the title of the pursuer than was done in the present case. There, if it be contended that the title of the pursuer is bad because a possession of forty years has run against it, the only question will be, whether or not such possession has been bad ? But the case is different, where the action arises between privies in blood, where the pursuer sets forth the entail, and certain acts of the other party, which are stated to be contraventions ; and the conclusion is thence drawn, that she is heir of entail, entitled to take possession. In the present cause, that point is no where determined ; but, according to the printed opinions of the judges, there is not one who does not go to the full extent, that if Mrs. Fullerton be a remote substitute, she would not be entitled to deduction of her minority.

“ In order to avoid adjudication upon this point, and to give the Court room to consider the case with attention, and, as I agree with the statement given by the noble and learned Lord, I therefore move, That the cause be remitted back to the Court of Session in Scotland to review the interlocutors appealed from, and to consider how far the validity of the title to exclude set up by the defendant is in this case involved with the title set up by the pursuer to sustain the action of reduction and declarator, as having become the nearest substitute under the deed of entail in the manner alleged on her behalf ; and if the Court shall hold these questions to be in this case involved with each other, that they do pronounce an interlocutor for or against that title, and also on the effect which such judgment may have upon the interlocutors directed to be reviewed.”

Accordingly it was

Ordered and adjudged that the cause be remitted back to the Court of Session in Scotland to review the interlocutors appealed from, and to consider how far the

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validity of the title to exclude, set up by the defender, is in this case involved with the title set up by the pursuer, to sustain the action of reduction and declarator, as having become the nearest substitute under the deed of entail, in the manner alleged on her behalf; and if the Court shall hold these questions to be, in this case, involved with each other, that they do pronounce an interlocutor for or against that title, and also on the effects which such judgment may have upon the interlocutors directed to be reviewed.

For Appellant, *Henry Erskine, Geo. Ferguson, Thomas Thomson.*

For Respondents, *Sir John Scott, W. Grant, J. Anstruther, Wm. Adam, Wm. Tait.*

APPENDIX.

[The Collection of Appeal Cases in the Advocate's Library, of which the Compiler has availed himself, is defective in some parts, and hence omissions will occur, which can only be supplied from other Collections. The most perfect Collection of Appeals, for the period it embraces, is one in the possession of Lord Murray, which his Lordship was pleased kindly to place at the Compiler's disposal.]

GABRIEL NAPIER of Craig Annet, Sheriff-Depute } *Appellant* ;
of Stirling, }
GEORGE M'FARLANE, Drover, } *Respondent*.

House of Lords, 14th April 1749.

WAIF AND STRAY—PRICE OF AN OX—COMPETENCY OF ACTION BEFORE THE COURT OF SESSION.—

THIS was an action raised before the Court of Session by the respondent, for the sum of £8 Sterling, as the price of an ox belonging to him, and which had been taken possession of by the appellant as waif and stray, he being, as alleged, entitled as Sheriff-depute of the county, to claim all such property so found ; and the respondent's ox having so strayed, was put into the Sheriff's own parks, and, after a certain time, killed and used for his own family.

The respondent's allegations in regard to the ox were, That having brought a great number of black cattle to Falkirk Tryst, with the view, if not sold, of taking them on to the English markets, “ among other cattle brought to the market of Falkirk in 1744, “ there was one remarkable grey ox, which being of a size much “ larger than usual, and therefore improper to be mixed with the “ smaller country cattle, the respondent resolved to leave it at home, “ and to turn him to grass in his parks at Kilsyth. That this animal being young, of high spirits, and full of flesh, took a fancy to “ separate from his companions, and, terrified by the noise and clamour which generally prevail on these occasions, where such numbers of cattle are crowded together, became a little unruly, and “ sallying forth, endeavoured to break in upon the next drove ; but “ being checked by his keepers, who had a watchful eye over him, “ was immediately brought back to his proper station, there to remain until he should be sent back to the parks at Kilsyth. Mean-

1749.

NAPIER
v.
M'FARLANE.

1747.
 ———
 NAPIER
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"time he and his other servants went over to England with the remainder of his cattle." The man who was left in charge to take home the ox to the Kilsyth parks had driven it part on the way home, but was obliged to give it to a neighbouring farmer of the respondent, to be delivered by him to the keeper of the Kilsyth parks, which he undertook to do. "It thus happened that the ox, a stranger to these grounds, and unacquainted with his new companions, strayed in upon a neighbouring farm, the property of the appellant, whereupon the appellant, as claiming right to waif and strayed goods, by virtue of his temporary grant of the Sheriffship of the said county, took the ox into his own custody, and put him to grass in his own parks, intending, as it afterwards appeared, to make use of him for winter provision for his family."

To this action the appellant pleaded two special defences: 1st. That the cause was not competent in the Court of Session, by the showing of the libel itself, which charges the ox "or stott" libelled to be worth £8, which, though treble its true value, was still less than 200 merks Scots (the lowest sum that by law can be brought in the first instance in that Court); 2dly. That the defender conducted himself agreeably to the law and the duty of his office as Sheriff-depute in respect of the stott libelled.

The respondent further alleged and proved, that he had claimed delivery of the ox by written letter, and also by a message sent through his servant, before it was made use of by the appellant.

The Lord Ordinary repelled the dilatory defence to the competency of the action brought before him, and allowed a proof to the respondent of his libel, and the property of the stott, and all facts and circumstances in relation thereto; and allowed the appellant to prove, on his part, the several intimations made by him as to the stott at the church doors in the neighbourhood, and at the market cross of Stirling, "and of the appreciation of the said stott, and the extent of said appreciation."

After the proof was closed, and various interlocutors were pronounced, the Court finally pronounced this interlocutor: "Find the defender (appellant) liable in three guineas, as the value of the stott (ox) in question, and in the expense of the process, and ordain the pursuer to give in an account of the same against next day." Thereafter, and upon considering the account given in, the Court modified the expenses to £15 Sterling, and decerned therefor, and for the value of the stott, &c. And, upon reclaiming petition, the Court adhered.

Against these several interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. That the cause was not competent in the Court of Session. 2. That the appellant, by his conduct, has done nothing illegal or injurious to the respondent, or deserving of any censure or penalty. 3. The respondent's behaviour has been

highly unjustifiable, vexatious, and oppressive, by neglecting to bring proof of the property when he ought to have brought it at first, and by wilfully disdaining to apply to the Sheriff for that end, as others in the like cases have done, in order to recover their strayed cattle, and also from his insisting upon prosecuting, after the appellant offered to make satisfaction for the value, if the stott really belonged to him.

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Pleaded by the Respondent.—The respondent did enter his claim to the property of the ox in due time, which he notified to the appellant, praying redelivery, and offering payment of whatever sum might be demanded in name of grass mail and other expenses; and the evidence then given that the ox belonged to him was such as ought to have satisfied the appellant.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For the Appellant, *W. Grant, W. Murray.*

For the Respondent, *Alex. Lockhart, A. Forrester.*

NOTE.—This case, from the peculiar nature of the dispute, and the trivial sum involved, produced a good deal of noise in Westminster Hall. It is mentioned in Blackstone's Commentaries, 8vo. Edit. vol. iii. p. 393.

(Mor. 14,019, *et* Lord Monboddo's Remarks, 5 Brown's Sup. 926, *et* Bell's Com. p. 659.)

THE EARL OF ROSEBERRY, *Appellant* ;
THE CREDITORS OF HUGH LORD VISCOUNT PRIMROSE, } *Respondents.*
Deceased, }

House of Lords, 3d April, 1767.

ENTAIL—REGISTRATION—ACT 1685—PASSIVE REPRESENTATION.—

(1.) An entail was made, and charter and infeftment passed thereon some years before the Act 1685, regarding the recording of entails, Held, that in order to protect against creditors, such an entail must be recorded. (2.) An heir succeeding, not by an universal title, but as heir under a particular destination, and not *hæres alioquin successurus*, found only liable to the extent of the value to which he succeeded.

Sir Archibald Primrose, Bart., executed a strict entail of his estate of Carrington, or Primrose, in 1680, in favour of his eldest son, Sir William Primrose, and the heirs male of his body, with several remainders over. Charter under the great seal passed on this entail, of this date, and the infeftment taken thereupon was recorded in the proper register.

1681.

Apr. 29, 1682.

The prohibitory, irritant and resolute clauses of the entail, which were directed against selling, alienating, wadsetting, and the contraction of debts, were repeated in the charter and infeftment, and also in all the subsequent investitures of the estate.

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 PRIMROSE.

In 1685, four years after executing this entail, the act regarding the registration of entails was passed; and it was alleged by the appellant, that it was understood, at the time the act was passed, that it was only applicable to entails executed subsequent to its date.

In 1690, an act was passed "for the security of the creditors, vassals, and heirs of entail, of persons forfeited," by which it is provided that the heirs of entail shall not be prejudiced by the forfeitures of their predecessors, "provided the right of tailzie be registered, and conform to the act of Parliament in the year 1685."

In consequence of this act, some of the old entails made before the year 1685, were produced to the Lords of Session, and recorded in terms of the act 1685.

1741.

The male line of Sir William Primrose having failed by the death of Hugh Lord Viscount Primrose, in May 1741, without issue, the succession to the entailed estate opened to the next remainder man, James Earl of Roseberry, who was served, retoured, and infest, as heir of tailzie to the Viscount, and his infestment duly recorded.

The Viscount Primrose died much in debt, his unentailed estate and his personal property being inadequate to pay the claims of his creditors.

After the entailed estate had been possessed by the appellant and his predecessors for 22 years, the creditors of Lord Viscount Primrose raised an action against the appellant, as heir of provision in the Primrose estate, for the payment of the balance still due to them. This they did, upon the ground that the entail was invalid against creditors, in consequence of its not being recorded, contending that the act 1685 applied to entails made before, as well as subsequent to, the date thereof.

The answer made was, that the act only applied to entails made subsequent to its date. But here the entail was completed by charter and infestment before the statute ordering the registration of entails was passed.

June 25, 1765.

The Lords pronounced this interlocutor: "Find, that the tailzie of the estate of Primrose, founded on by the defender, though bearing date, and completed by infestment, prior to the act concerning tailzies in the year 1685; yet, not having been recorded in the register of tailzies, in terms of that statute, is not effectual against creditors, and therefore the Lords repel the defence founded on the said tailzie, and remit to the Lord Ordinary to proceed accordingly." On further petition, in which, besides arguing the point of registration, the appellant contended, that as he took the estate of Primrose in the character of heir of provision to the Viscount, and not by a universal title, he could only be liable to the creditors *in valorem* of that succession. The Court adhered as to

July 9, 1765.

the registration of the entail; and as to the second point, remitted to the Ordinary. The Lord Ordinary thereafter ordained the credi-

tors to give in an account and state of their debts, and the defender to give in objections. This being done, the Lord Ordinary "Found
" the appellant liable for the debts as contained in the said state,
" amounting, at the term of Martinmas 1765, to the sum of £3892.
" 7s. 0 $\frac{1}{4}$ d."

1767.

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CREDITORS OF

LORD

PRIMROSE.

Dec. 11, 1765

Jan. 25, 1776.

July 18, 1766.

But on representation, in which much discussion took place as to the debts of the creditors and the Earl's liability therefor, the Court, on the report of Lord Baljarg, found, that the " Earl of Roseberry is
" liable for the debts of the deceased Hugh Viscount Primrose to
" the extent only of the value of the estate of Carrington and rents
" thereof. But as to the quantum of the said rents for which he is
" liable, remit to the Ordinary." The Court further repelled, by the same interlocutor, several objections stated by the appellant to the accounts, particularly to the promissory note due to Baird, and an English bond due to Mrs. Erskine, on the ground of prescription.

Against these interlocutors, in so far as unfavourable to the appellant, the present appeal was brought.

Pleaded for the Appellant.—The law of Scotland, with respect to the efficacy of entails, before the act of Parliament 1685, is fixed and clear; it was settled by the judgment in the case of the creditors of the Earl of Annandale, and by an universal acquiescence therewith for upwards of 23 years. And as the entail in question was made and completed by charter and infeftment several years before 1685, it must, in common law, have been effectual, and barred the respondents, were it not for the act 1685. But as that statute bears no retrospect on the face of it, the words and the evident meaning as to registration, are clearly confined to future entails, or entails made after its date. The legislature clearly understood it so, for no anterior entails were recorded in consequence of the act. The Courts of justice likewise followed the same construction, for in every question, in regard to entails so made, the entail was sustained as effectual. Even the respondents were of the same opinion in 1741, when their debtor died, and they continued of this opinion for 22 years thereafter. A contrary construction would undo every old entail; for if registration be necessary, as the law does not enforce the recording of old entails, it would rest entirely with the heir of provision whether any of these entails should be effectual—a state of things which the law never intended.

Pleaded for the Respondents.—By the express words of the statute 1685, no tailzies are to be effectual against purchasers and creditors, but such only as have the prohibitive, irritant, and resolute clauses inserted in the original and progressive title deeds, and where the tailzie itself is produced judicially to the Lords of Session, and by them allowed of and recorded in the register of tailzies; and, therefore, as this tailzie of the estate of *Primrose* was not produced judicially to the Lords of Session, nor by them allowed nor recorded in the register of tailzies, it cannot affect creditors contracting with

1770. the heir in possession. Besides, the act 1690, enacting that no heir of entail shall be prejudged by the forfeiture of his predecessor, provided the entail be registered conform to the act 1685, manifestly supposes that all entails containing prohibitive, irritant, and resolute clauses, ought to be recorded.

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For the Appellant, *C. York, Al. Wedderburn.*

For the Respondents, *Jas. Montgomery, Thos. Lockhart.*

NOTE—The 2nd point was not appealed, as is supposed by Professor Bell, (Com. vol. i. p. 659, n. 1.)

THE EARL OF ROSEBERRY,	<i>Appellant ;</i>
WM. FOULIS, Esq. and OTHERS, the Heirs-Substitutes and Creditors of the Entailed Estate of Primrose,	<i>Respondents.</i>

House of Lords, 4th May 1770.

ENTAIL—PROHIBITION AGAINST CONTRACTING DEBTS.—An entail was executed of an estate, with prohibitory, irritant, and resolute clauses, directed against the contraction of debt, or burdening the estate, or selling or alienating the same. A subsequent heir of entail having contracted debt, a succeeding heir of entail applied to the Court for liberty to sell part of the estate for payment thereof: Held, that by the conception of the entail, the pursuer could not sell for the payment of debts. Affirmed in the House of Lords, on the special ground, that the debts were contracted since the death of the entailer, contrary to his intention.

The estate of Carrington originally belonged to Sir Archibald Primrose, and afterwards to his grandson, Hugh Lord Viscount Primrose. It stood devised by strict entail, executed by the said Archibald to his eldest son William, and the heirs male of his body, remainder to his youngest son Archibald, and the heirs male of his body, with several remainders over. It contained prohibitive, irritant, and resolute clauses against altering the order of succession, aliening the estate in whole or in part, charging it with debts, or doing any fact or deed by which the same might be apprised or adjudged. The entail itself was lost, but charter under the great seal, 9th December 1681, passed thereupon in favour of the son, which, with the instrument of sasine, were extant; but the entail was never recorded in the register of tailzies.

In 1741, the male line of Sir William Primrose having failed, by the death of Hugh Lord Viscount Primrose without issue, James Earl of Roseberry, the appellant's father, eldest son of Archibald Primrose, the second son of the maker of the entail, was served heir of tailzie to his cousin, Lord Primrose, and was infeft in Carrington in 1742.

The question was, Whether this entail of the Carrington estate

was good against the debts of the creditors of his father and of Lord Primrose. The appellant having brought an action (ranking and sale) for the sale of part of the estate for the purpose of paying off these debts, and praying the Court to "authorise a sale of as much of the said lands and estate as will pay the said debts, and to find and declare that by such sale the appellant shall not incur any irritancy of the entail." The respondent contended that the entail gave no power to sell part of the estate for the said debts.

1771.

 NICOLSON
v.
NICOLSON.

The Court, after full memorials, "found, and hereby find, That Mar. 6, 1770.
"by the conception of the entail of the estate of Primrose (Carrington) neither the pursuer (appellant) nor any of the heirs of entail, are empowered to sell any part of the estate for payment of the debts, and therefore refuse to interfere or authorise any sale for that purpose."

Against this interlocutor the present appeal was brought to the House of Lords.

After counsel were heard, it was

Ordered and adjudged that the interlocutor be affirmed, because the debts in this case have arisen since the death of the maker of the entail, contrary to his intention, and from a cause which he could not foresee; without prejudice to the question, if the debts had been contracted by the maker of the entail, or any of his predecessors.

For the Appellant, *Jas. Montgomery.*

Ex parte.

Mrs. MARGARET HOUSTON STEWART NICOLSON,
HOUSTON STEWART NICOLSON, Esq.,

Appellant;
Respondent.

House of Lords, 18th Feb. 1771.

DIVORCE—PROOF—ADMISSIBILITY OF PARTICEPS CRIMINIS—ALSO OF A SLAVE.—In the course of a proof, in an action of divorce against the wife, the party with whom she had adultery was adduced as a witness against her: Held him admissible as a witness. This judgment affirmed in the House of Lords. It was also objected to a slave, that he was incapable of bearing testimony, he not being a Christian, or able to take the usual oath. The Court of Session ordered him to be examined as to his belief or creed. This affirmed on appeal.

This was an action of divorce brought by the respondent against his wife, on the ground of adultery, committed by her with William Graham, a servant man to Sir William Maxwell of Springkell, while on a visit at Springkell.

A proof being allowed by the Commissaries, in the course thereof the appellant stated certain objections to the witnesses offered as incompetent in law.

1771.
 ———
 NICOLSON
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In the first place, she objected to William Graham as a witness, on the ground that he was a *particeps criminis*, the alleged adulterer, and therefore a party who could not be examined to prove the adultery. 2nd. She next objected to Lady Maxwell and Sir William Maxwell adduced against her as witnesses, on the ground of relationship to the pursuer who adduced them, Lady Maxwell being his sister. 3d. She next objected to the admissibility of a negro named Latchemo, in the service of the respondent's sister Lady Maxwell; on the ground that a slave was inadmissible, as not being a Christian, and therefore incapable of feeling and understanding the proper sanctions of an oath. 4th. She next objected to the admissibility of John Busbie, on the ground of his having acted as agent in the cause, and therefore objectionable on the ground of agency.

July 4, 1776. The Commissioners pronounced this interlocutor :—" Having considered the depositions of the witnesses already adduced, with the objections stated to those offered, allow Sir William Maxwell to be examined *cum nota*; as also allow Lady Maxwell to be adduced, reserving to the defender to put such interrogations to her *in initialibus* as may further tend to support the objections to her testimony. And reserving to the Commissaries to judge of the import of the witnesses answers to these interrogatories, and likewise to judge what credit is due to her testimony, in case she shall be admitted: Find the objections stated against the evidence of the said William Graham not competent at the defender's instance; and therefore repel the said objections, and allow the witness to be adduced; reserving to him, in case he thinks fit, to object to his own examination, or to the interrogatories to be put to him, and to the Court to judge of the import of his objections, if any such are offered, as accords: As to Latchemo the negro, before answer, appoint him to appear in Court, in order to be examined upon the articles of his faith: And find, That the said John Busbie cannot be examined as a witness upon any facts that have come to his knowledge since the time that he was employed as an agent in this cause; and so far sustain the objections stated against him."

In an advocacy, the Lord Ordinary, after advising with the
 Dec. 6, 1776. Lords, pronounced this interlocutor: " Refuses the bill with respect to William Graham, and Latchemo the negro, being examined as witnesses in this cause, and in so far remits the cause to the Commissaries simpliciter; and farther remits the cause to the Commissaries with this instruction, that they first determine the question with respect to their allowing Lady Maxwell to be examined as a witness in this cause, and then, before determining the question, Whether Sir Wm. Maxwell is to be examined? that they ordain the pursuer to give in a special condescendence of the questions in which he proposes to interrogate the said Sir William Maxwell."

The appellant brought the present appeal against the interlocutors of the Commissaries and of the Court of Session, in so far as they

permit the examination of William Graham and Latchemo the negro slave.

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Pleaded for the Appellant.—As to the admissibility of William Graham, the particeps criminis, with whom the adultery is said to have been committed. 1st. By the civil law, which, when not opposed by statute or feudal law, takes place universally in Scotland, the person accused as adulterer could not be examined to prove the adultery, neither could a person convicted of adultery be a witness at all; and the same is the law of Scotland, in conformity with the civil law. There are various decisions in Scotland upon these principles, and the following very late one, in the case of Carruthers against his wife, when the Court of Session added this instruction to the order allowing a proof, viz. “That he, Bell, (the person with whom the wife was charged to have committed adultery,) be not admitted a witness either for or against the defender, as to the facts charged against him by the other witnesses.” The present case falls under both these rules; for, 1. The pursuer accuses Graham as the adulterer; and, 2. The purport of asking his oath, is to make him confess it, which is equivalent to a conviction. 2. The appellant has reason to believe that some precedents, alleged to have been brought from the ecclesiastical courts in England, greatly influenced the Court of Session in making the last judgment complained of. The appellant is a stranger to these cases, as well as the grounds on which they proceeded. She apprehends the circumstances attending them must have been totally different from those attending the present case. But whether they were or not, these ought not to have had any more effect *here* than as exhibiting the course of practice in any other foreign jurisdiction; and it is humbly submitted that it is the law of Scotland which must govern the case. By the law of Scotland, the evidence of ultroneous witnesses (that is, persons offering themselves as such,) cannot be received; and the Court here has departed from the Scotch practice, by authorising the examination of Graham, and in the same breath allowing him to object to such examination, thereby giving him an option of being or not being examined, which, in case the former should be his choice, must fix the character of ultroneous witness on him. Further, he was objectionable on another ground. It has been seen that he was servant to Sir William and Lady Maxwell, and it has all but been proved, that this action was first instigated by Lady Maxwell, and carried on by the direction of Sir William. Graham is the son of one of Sir William’s tenants, was brought up in his family, and rose gradually to the station of upper servant, and was a favourite with Sir William and his Lady, from all which he is under such influence as disqualifies him. 3. As to the admissibility of Latchemo, Sir William’s negro slave, the appellant humbly apprehends, that till Sir William himself is admitted as a witness in this cause, his slave ought not nor can be received, and that no slave, by the law of Scotland, can be received as a witness.

Vide Pan: De
Ritu. Nupt.
L. 43. Ma-
theus de Tes-
tib. Par. 4.
Stat. Wm. the
Lyon, c. 2.
Sir George
Mackenzie,
tit. Witness
10.

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NICOLSON
v.
NICOLSON.

Pleaded for the Respondent.—There are two points to be determined here ; first, Whether William Graham, the person accused of the adultery with the appellant, is an admissible witness against her, and, 2. Whether the negro slave shall be admitted ?

There is nothing in the law of Scotland which puts a negative upon the evidence of the particeps criminis. On the contrary, from the authorities, both in the civil and Scotch law above quoted, it is clear that such evidence is not only admissible, but requisite and necessary, in proving adultery and all other crimes. These authorities are corroborated and strengthened by the uniform practice not only of the spiritual court in Scotland, where the adulterer has generally been permitted to give evidence, but also by the practice of the civil or criminal courts, where, in trials for murder, robbery, forgery, and other crimes, the socii have always been admitted as witnesses. This rule is not peculiar to the spiritual court of Scotland, but is also the rule in the spiritual courts in England, where the paramour is admitted as a competent witness. The objections therefore, *Quod nemo tenetur jurare in turpitudinem suam*, and that the witness, by swearing to the fact, renders himself infamous and intestible, are both of them admissions of the matter the respondent has undertaken to prove, and might perhaps supersede the necessity of his calling any witnesses. The objection, if good at all, is personal to the witness alone, and not competent to the appellant. As to the case of Carruthers founded on, Bell was adduced for the defender and not for the pursuer of the divorce, and so does not apply to this case. And as to the objection from the influence which Lady and Sir William Maxwell (who are alleged to have instigated the action) have over the witness, both the one and the other are groundless. But where, as in this case, the judges have reserved to themselves to judge what degree of credibility shall be given to his evidence, all these objections become frivolous. 2. All that the Court has determined respecting Latchemo the negro, is, That he is to be examined on the article of his faith ; which is a proceeding so unexceptionable that it is amazing it should have been complained of in this appeal. If, from the examination, the Court shall judge it improper to take his evidence in the cause, he will be rejected. If otherwise, his being in a state of slavery to Sir Wm. Maxwell, can afford no legal objection to his admissibility, when he is to give evidence under the protection of the law.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Al. Wedderburn, J. Dunning, J Dalrymple.*

For Respondent, *Jas. Montgomery, Thos. Lockhart.*

1772.

[Mor. 5539.]

ROBERT WILLOCK of Cornhill, London, Bookseller ;	} <i>Appellants ;</i>	WILLOCK, &c. v. OUCHTERLONY.
and PATRICK and JOHN STRATON of Montrose,		
Merchants,		
JOHN OUCHTERLONY of Montrose, Esq.,	<i>Respondent.</i>	

Et e contra.

House of Lords, 30th March 1772.

ARREARS OF INTEREST—ADJUDICATIONS—HERITABLE BOND—HERITABLE OR MOVEABLE.—(1.) An heritable bond was granted for a large amount—after which decret of adjudication was obtained thereon, for principal and arrears of interest. Part (£5500) of the principal sum contained in the heritable bond, was conveyed, without any mention of the adjudication, to Alexander Ouchterlony, and by him to his brother George in life-rent, and to his nephew John in fee. The latter's heir, on the death, first of Alexander and then of George, claimed not only the fee of £5500, but also the arrears of interest due thereon, amounting to £4296. Held that the arrears were heritable, and went to the heir and not to the executors of the will of George: Reversed on appeal, and the executors by the will entitled to the arrears. (2d.) The other part of the heritable debt (£4517. 15s.), and certain annuity bonds, were conveyed by George to his trustees by a trust deed, reserving power to alter ; and a will made in virtue of this reserved power, Held that these were sufficiently conveyed so as to go to his executors, and beyond the claim of his heir at law.

John Ouchterlony, merchant in Montrose, and Alexander and George Ouchterlony, merchants in London, were brothers german ; and they had one sister, who was the mother of the appellant, Robert Willock. Neither Alexander nor George left any issue ; but John, the eldest brother, left issue, Robert his eldest son, and John his second ; and also two daughters, Margaret, who is the wife of Patrick Straton, and Margery, unmarried. Robert died, leaving five children, three sons and two daughters, whereof John Ouchterlony, the respondent, is the eldest son. John, the younger brother of Robert, died without issue.

Thus the respondent John Ouchterlony became heir at law not only of his father and grandfather, but also of Alexander and George Ouchterlony his grand-uncles, and of John his uncle. Under this character he was claiming almost the whole residue of his grandfather George's estate. And the present question occurred between him and the appellants, who are the trustees and executors of the grand-uncle, who held the estate for the purpose of distribution among a number of nephews and nieces.

The Duke of Norfolk and partners, lessees under Sir Alex. Murray, of his mines in the county of Argyle, granted a sublease of those mines to the York Buildings Co. for the term of twenty-five years, at a tack duty of £3600. For better security of the regular payment of the rent, the Duke and his partners were infeft in the York Build-

1772. **WILLOCK, &c.** ^{v.} **OUCHTERLONY.** ings Co. estates in Scotland; and the Company likewise granted personal annuity bonds to the several partners for their respective proportions of the said rent transferable by indorsement; and to four of these bonds, for £25 each, the said Alexander Ouchterlony, the respondent's grand uncle, acquired right by indorsation from the Duke of Norfolk, Sir Robert Sutton, and Sir Alex. Murray, the original grantees. Three of these bonds were the absolute property and separate estate of Alexander Ouchterlony, the fourth was indorsed to him in security of a debt due by Sir Alexander Murray.

The York Buildings Company having failed to pay their rent, the Duke of Norfolk and partners sued out adjudications against the Company's estates, for securing payment of these arrears, and upon all of these adjudications, charter was obtained, and infestment passed thereon.

Nov. 12, 1737. Of this date, Charles Murray, heir of Sir Alexander Murray, to whom Sir Alexander had conveyed his estates, granted an heritable bond over his lands to George Ouchterlony, for the sum of £10,017. 15s. with an annual rent for the same of £500. 17s. 9d. or such an annual rent, less or more, as should at the time correspond to the said principal sum. This heritable bond contained an assignation to such share of the mines and minerals as remained in and belonged to the said Charles Murray at the time of granting the said heritable bond, and were not let or disposed of formerly by him. A decree of adjudication of the estates so mortgaged was obtained in the name of George, for the principal sum, penalty, and interest, contained in the said heritable bond, extending at the date of the decree to the sum of £12,371. 15s.

Aug. 17, 1742. George Ouchterlony by disposition, wherein he recited the aforesaid heritable bond granted to him by the said Charles Murray, and seisin thereupon taken, but did not mention the aforesaid decree of adjudication, sold and disposed to John Arbuthnot a yearly annual rent of £275. as part of the said yearly annual rent of £500. 17s. 9d., or such an annual rent less or more as should correspond to the principal sum of £5500. therein after assigned, being part of the said sum of £10,017. 15s. for which the heritable bond above mentioned was granted. And thereby assigned to him the heritable bond to the extent of £5500, together with the heritable bond itself in all its pro-

Aug. 3, 1753. visions, articles, heads, and clauses. John Arbuthnot conveyed this right, so acquired by him, to Alexander Ouchterlony, but without any mention being made of the decree of adjudication above set

Oct. 17, 1753. forth. Of this date, Alexander conveyed to George Ouchterlony, his brother in liferent, and to John Ouchterlony his nephew in fee, the foresaid annual rent of £275, and principal sum of £5500, with the interest thereof from and after the day of his decease, with this proviso, that George should pay the interest of all his debts due by him, without recourse against his nephew. But this disposition he reserved power to alter. Accordingly Alexander, executed a last will

and testament, in the following terms, “ As to my estates, goods and
 “ chatels, my will is, that after payment of all my debts, as also le-
 “ gacies which I shall herein, or by a codicil, mention to be paid to
 “ sundry persons, the residue, whether personal or real, may go to
 “ the sole use and benefit of my brother, George Ouchterlony, and
 “ in remainder to John Ouchterlony, my nephew, on condition, how-
 “ ever, that the said John, my nephew, does pay, or cause to be
 “ paid to my said brother, whatever interest he may receive at any
 “ time on an heritable bond, for the principal sum of £5500 on the
 “ estate of Charles Murray of Stanope, Esq., which I disposed to my
 “ said nephew John Ouchterlony.” “ I likewise more particularly
 “ mention the bonds or general sums due from the York Buildings
 “ Company, for the payment of rent on a lease to the said Company,
 “ of mines in Argyleshire let to them by the late Duke of Norfolk,
 “ Sir Robert Sutton, and others, together with the accumulated in-
 “ terest due thereon by infestment and adjudications on their estates
 “ in Scotland, amounting to the sum of £100 yearly rent for my
 “ share, contained in separate bonds assigned to me by the Duke of
 “ Norfolk, Sir Robert Sutton, and Sir Alexander Murray ; and this
 “ I mean to be in as much force as if the said bonds were made over,
 “ disposed, or assigned to the said George my brother, in the forms
 “ of the law of Scotland, and as the said bonds are made over to me
 “ as above specified.”

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April 5, 1754.

Alexander died of this date. His nephew also died unmarried April 1758.
 and intestate. Feb. 1762.

By the death of Alexander and John Ouchterlony, the right to the debt on the estate of Stanope stood thus. There remained with George, in virtue of his original heritable bond right, the sum of £4517. 15s., being part of the principal sum contained in the heritable bond, with a proportional part of the interest and penalty, and the whole benefit of the accumulations contained in the aforesaid decree of adjudication, of which he had never conveyed any part. George had also right, by his brother Alexander's deed of disposition of 17th October 1753, and last will and testament of 5th April 1754, to the liferent and annual interest of the sum of £5500, being the residue of the principal sum contained in the said heritable bond, inclusive of arrears due at his brother's death. And the respondent, the grand nephew, as heir at law of his uncle, the said John Ouchterlony, the nephew of Alexander and George, had right to the fee of the said sum.

George had right also to the annuity bonds by the will of his brother Alexander. But a doubt having arisen whether the right to these funds could, by the law of Scotland, be effectually conveyed by will, being secured by infestment and adjudication, the respondent agreed to grant a conveyance of the same to George Ouchterlony, Oct. 8, 1760. which was done accordingly.

Thus stood the right and interest of George Ouchterlony in these

1772. two debts, when he executed a disposition and assignation, whereby he conveyed to the appellants, Robert Willock, Patrick and John
 WILLOCK, &c. Straton, and the respondent John Ouchterlony, *that share of the debt*
 v. *or heritable bond* over the estate of Stanope, which belonged to him,
 UCHTERLO NY. being £4517. 15s. of the principal sum contained therein. He also
 “ assigned, transferred and disposed to and in favour of the said trus-
 “ tees, all mines and minerals and metals already discovered, or which
 “ should thereafter happen to be discovered, in the whole lands and
 “ others above mentioned. As also all lead ore and other ore what-
 “ soever, and particularly his share of the tack duty due by the York
 “ Buildings Company, and bonds issued by them therefore. In
 “ trust for the purposes therein mentioned.”

ar. 5, 1762. Farther, of this date, George Ouchterlony executed his last will, whereby he bequeathed many special legacies and annuities to friends and relations. Amongst others, he left the bequest of £50 to the respondent, in the following terms: “ Whereas my grand nephew,
 “ John Ouchterlony is handsomely provided for, as being the ne-
 “ phew and heir at law of my late nephew, John Ouchterlony of
 “ London, merchant, deceased (alluding to the respondent’s succes-
 “ sion to the fee of the aforesaid partial sum of £5500), I therefore
 “ give to him, &c.” He disposed of the residue of his estate as fol-
 lows: “ All the rest and residue of my estate, ready money, plate,
 “ linen, stock in business, and all bonds, bills, notes, mortgages, and
 “ leases, government and other securities for money, and all the in-
 “ terest, rents and profits that shall be due thereon at the time of my
 “ decease, and all other my estate and effects of whatever nature or
 “ kind soever and wheresoever, which I shall die seized, possessed
 “ of, or entitled to, I give, devise, and bequeath the same unto and
 “ amongst all and every of my nephews and nieces, grand nephews
 “ and grand nieces equally, to be divided betwixt them share and
 “ share alike.” Robert Willock, Patrick Straton, and the respondent, were the executors of this will.

George Ouchterlony died two years thereafter, 1764. The will was proved in the prerogative court of Canterbury by the appellants Robert Willock and Patrick Straton. The respondent not only accepted of his legacy of £50 under the will, but also drew a dividend of £300, as one of the residuary legatees, under the description of grand nephew. He likewise acquiesced in and approved of the trust deed of Feb. 1762, and acted under it in the character of trustee, by accepting a factory along with his co-trustees, appointing a person in Edinburgh to uplift the debts and funds in Scotland.

It was stated by the appellants, that the transaction by which the respondent conveyed, by his disposition of 8th October 1760, the annuity bonds to George Ouchterlony, was unknown to them, whereby the respondent was enabled to recover payment of these, amounting to £2279. 0s. 11d.

In a ranking and sale of Sir Alexander and Charles Murray’s

estates of Stanope, both of these debts were ranked as follows; viz. 1772.
 the respondent for £5500, and for the annual rents bygone then in arrear, and in time coming. And the appellants, as trustees, for WILLOCK, &c.
 £4517. 15s. as the remaining part of the said total principal sum, v.
 and the annual rents thereof then past due, and to become due. OUCHTERLONY.
 Neither party agreeing in this ranking of their claims, it was agreed that they should both consent to give the purchaser a conveyance, reserving all questions as between themselves.

Accordingly the respondent received £5500 of principal, and £4552. 19s. 2d. of interest due thereon. The appellants received £4517. 15s. and £3426. 14s. 10d. of interest.

The appellants having discovered the disposition of 8th October 1760, were advised that they had right to £1709. 5s. 8d., as the proportion of £2279. 0s. 11d., corresponding to the three bonds above alluded to. And also to the whole interest of £4552. 19s. 2d. due on the principal sum of £5500, at the death of George Ouchterlony.

On the other hand, the respondent claimed the other share of the heritable bond, namely, the £4517. 15s. of principal, and the £3420. of interest, on the ground that it was not properly conveyed, and belonged to him as heir at law. Mutual actions against each other having been brought and conjoined.

The Lords, on the report of the Lord Justice Clerk, pronounced this interlocutor:—"1. Sustained the defence proponed for Dec. 14, 1769.
 " John Ouchterlony against payment of the sum of £4296, as the
 " balance of the interest of the principal sum of £5500 sterling,
 " which was resting owing at the time of George Ouchterlony's
 " death, and assoilzied the said John Ouchterlony from that branch
 " of the libel, at the instance of the trustees of George Ouchterlony
 " against him. 2. Repel the defence proponed for the said John
 " Ouchterlony against payment of the sum of £1709. 5s. 8d. uplift-
 " ed by the said John Ouchterlony; find that the said sum does
 " fall under the trust right libelled on, executed by the said George
 " Ouchterlony in favour of the said Robert Willock and his other
 " trustees; find the said John Ouchterlony liable in payment of the
 " said sum to the trustees, and interest thereof from the 11th of
 " August 1764, when he received the same. 3. Sustain the de-
 " fence proponed by the said Robert Willock and the other trustees
 " against payment of the sum of £4517. 15s. sterling, and annual
 " rents thereof, claimed by the libel at John Ouchterlony's instance
 " against the said trustees; found the said sum was carried by, and
 " vested in the trustees by the trust disposition executed by George
 " Ouchterlony in their favour, and the said George Ouchterlony's
 " latter will and testament relative to the said trust right; and as-
 " soilzied the said Robert Willock and the other trustees of George
 " Ouchterlony from the process brought at John Ouchterlony's in-
 " stance against them for payment of this sum; and decerned."

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On reclaiming, the Court adhered.

Against these two interlocutors the appellants appealed, in so far
 WILLOCK, &c. as the Lords of Session thereby sustain the defence stated by the
 v. respondent, against payment of the sum of £4296, as the interest
 OUCHTERLONY. due on the principal sum of £5500. And the respondent brought a
 Feb. 21, 1770. cross appeal, in regard to the other debts, namely, the £4517. 15s.,
 part of the heritable bond debt, and the debt due on the annuity
 bond.

Pleaded for the Appellants.—1st. Original appeal. Although by the form of the decree, an adjudication may perhaps be considered in law as a conveyance of land under reversion, in payment of the debt, yet, in the sense and understanding of mankind, it is only a security for the debt, and therefore they are led most naturally to believe that the *arrears of interest* due for this, like the arrears of interest due for every other debt secured upon a real estate, and like the arrears of *rent* due for a real estate itself, are personal assets, and go to the executor. Heritable bonds are commonly in the form of a conveyance of lands under reversion, and consequently, on the death of the creditor, or mortgagee, this right to the lands goes to his heir, as clearly as if it were *adjudged*. But when the debt comes to be paid off, and the lands redeemed, the heir must renounce his right, upon being paid the principal sum and interest since his succession ; for such *interest* as was due to the mortgagee at the time of his death, is personal assets, and payable to the executor. And no substantial reason can be given why arrears of rent due for lands, arrears of feu-duties, and arrears of interest due for a debt voluntarily secured by a conveyance and sasine of lands, should all go to the executor, and that the heir at law should, in this case, in defeasance of the will and intention of the defunct, be entitled to carry off so large an arrear of interest, merely because his predecessor had found it necessary for securing the debt to adjudge the debtor's estate.

2d. It is admitted that George Ouchterlony had a right to the whole interest due for the £5500 down to the day of his death, and might that very day have received it, in virtue of Alexander's conveyance to him in *liferent* ; and if he had so received it, there is no doubt it would now belong to the appellants, his executors, as personal assets, for the uses of his will, and which therefore ought not to be defeated by the accident of the testator's not being able to operate payment in his lifetime. 3d. Besides, Alexander Ouchterlony, in his conveyance to his brother George in *liferent*, and to his nephew John in fee, reserved power to alter the same at any time of his life, *et etiam in articulo mortis* ; and by his last will, made subsequent to the foresaid conveyance, he not only gave the *residue* of his estate, real and personal, to George, but *particularly* provided that John should pay over to George whatever interest he should at any time receive for said partial principal sum of £5500. Now, this proviso in the will having a relation to the foresaid con-

veyance, must be considered as part of it, and as John must have taken the fee, subject to this proviso, so the respondent, as his heir at law, must take subject to that proviso also. 4. But the adjudication was only a collateral security, and was not conveyed to John Arbuthnot, nor consequently by him to Alexander Ouchterlony; and the recitals, the assignments of, and obligations to make furthcoming the title-deeds and evidences in these conveyances, go no further than the heritable bond and sasine, and the adjudication is not mentioned from beginning to end. 5. The principal sum of £5500 was an estate for life in George from the death of Alexander; and the appellants, as the personal representatives of George, have right to the interest thereof, which accrued due during that period. 6. By homologation, the respondent is further barred from challenging the will of his grand uncle.

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On the cross appeal. By the trust deed in favour of the appellants, without the will executed in reference thereto, by virtue of powers reserved, the debt in question was effectually conveyed.

Pleaded for the Respondent.—The appellants admit the respondent's title to the principal sum of £5500, but, as executors of the will of George Ouchterlony, they claim the arrear of interest due thereon at the time of his death, as part of his personal estate. The respondent contends, that by the law of Scotland, the nature of the security itself, and the uniform judgments of the Court, the *interest* arising upon *adjudications* has always been considered as real estate descendable to the heir, and undevisable by testament. Whatever therefore might be the intentions of George Ouchterlony, with regard to this interest, it was not in his power to transmit it by will. It was equally heritable, by reason of the adjudication, with the principal sum upon which it arose, and of course must descend to the heir at law, and not to the executors; by the former of whom the adjudication alone could be renounced in favour of the debtor, had he redeemed it himself, or be assigned to the purchaser of his estate; and therefore the will, though it had expressly mentioned this interest, would have been altogether unavailable to the appellants. Neither can the appellants maintain their claim to this sum, as trustees named by George Ouchterlony in his trust-disposition of 27th February 1768, for this sum is not, through the whole of that deed, expressed or implied; and besides, the respondent, by his cross action, contends and maintains that the disposition itself is void and ineffectual, and therefore this interest must fall and belong to the respondent, as heir in the course of legal succession. On the cross appeal. The appellants have no right to retain the £4517. 15s. interest and costs received by them out of the heritable debt on Charles Murray's estate of Stanopè, which always remained with George Ouchterlony. This sum was real estate, being heritably secured by infeftments and adjudications; it was therefore impossible to transmit it by will; and without calling in the will, the trust disposition upon which the appellants found, can have no operation whatever. But, supposing it

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effectual, along with the will, to give the appellants the £4517. 15s., yet they have no right to demand repayment of the sum recovered from the York Buildings Company, because, under a fair construction of the trust disposition, neither these annuity bonds, nor the diligence used upon them, were conveyed, nor meant to be conveyed, to the appellants.

After hearing counsel, it was

Ordered and adjudged that the money received by George Ouchterlony, on account of interest upon Charles Murray's bond to him on the lands of Stanope, ought to be imputed in discharge of the interest, according to the order of time when the same became due, and after satisfaction of all the interest which incurred before Martinmas 1742, the said George ought to be considered as debtor to Alexander, assignee of John Arbuthnot, for a proportional part of the money so received by George corresponding to the interest of £5500. And it is further declared, that whatever money has been paid to the respondent, as and for the interest of the said sum of £5500, from Martinmas 1742 to the death of Alexander, ought to be considered as part of the personal estate of Alexander; and what has been paid to and received by the respondent for interest accrued due upon the said £5500, from the death of Alexander to the death of George, ought to be considered as part of the personal estate of the said George. And it is ordered and adjudged that the interlocutors, so far as they are complained of by the original appeal be reversed. And it is farther ordered, that the cause be remitted back to the Court of Session to proceed therein according to the declarations herein before made. And it is farther ordered, that the interlocutors, so far as they are complained of by the cross appeal be, and the same are hereby affirmed.

For Appellants, *Ja. Montgomery, J. Dunning.*

For Respondent, *Alex. Wedderburn, Alex. Wight.*

[Mor. 15,200.]

JAMES SCOTT of Comieston, Esq.,	.	.	.	<i>Appellant;</i>
GEORGE STRATON,	.	.	.	<i>Respondent.</i>

House of Lords, 13th May 1772.

LEASE IN PERPETUITY—SINGULAR SUCCESSOR—HOMOLOGATION—IRRITANCY.—A lease was granted to a party, and his heirs and assignees, for nineteen years after the death of a party; and after the expiry of these nineteen years, for a second nineteen years, and after the expiry of the second nineteen years, for the space of other nineteen years, and so forth from nineteen years to nineteen years, so long as the said party and his heirs and successors shall desire to possess. The lease had no definite ish, and the

tenant was bound to pay for each nineteen years an entry or grassum duty to the landlord. This lease having been sought to be reduced by a singular successor, after he had for some years received rents under this lease. Held, that it was a good lease, and affirmed in the House of Lords. The lease contained a clause providing, that if two years rent ran into the third unpaid, the lease was to be forfeited. Objection on this ground repelled.

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Sir Robert Graham granted to the respondent's ancestor, Andrew Straton, in 1620, a lease of the farm of Wardropertown, in the county of Kincardine, with the salmon fishing in the river of Northesk, to endure for the life of Christian Straton, widow of Alexander Bishop of Aberdeen, and for nineteen years after her death, for payment of 108 bolls, half meal and half bear, four bolls of wheat, a barrel of salmon, and six bolls of coals.

Of this date, the son of the said Sir Robert, now Sir Robert Graham, entered into an agreement with Andrew Straton, whereby, for the sum of £27. 15s. 6d., then paid by the said Andrew Straton, Sir Robert ratified the above lease "for nineteen years, after expiring of the years and space of the said Christian Straton's lifetime, and of the said nineteen years after her death; and after the expiry of the first nineteen years, for the space of other nineteen years; and after the expiry of the second nineteen years space thereby prorogate, for the space of other nineteen years, and so forth from nineteen years to nineteen years, so long as the said Andrew Straton, his heirs, successors, or assignees, shall desire to possess the said town and possession, they always paying to the said Sir Robert and his foresaids, the grassum at the entry of ilk nineteen years space, and the tack duty underwritten." And, on the other part, the said Andrew Straton binds and obliges himself, his heirs, executors, and successors, to pay to the said Sir Robert Graham, his heirs or assignees whatsoever, at the entry and beginning of ilk nineteen years, in name of entry or grassum duty, the sum of 500 merks Scots money, together with the ordinary yearly duty foresaid, in all time coming, during the said Andrew and his foresaids, their possession of the same." April 1642.

By an agreement between the said parties, entered into some Dec. 26, 1656. years thereafter, the right to the salmon fishing was renounced in favour of Sir Robert Graham.

In the year 1672, the appellant's father being a considerable creditor of Sir Robert's, adjudged or acquired right by judicial conveyance to the property of the said lands of Wardropertown. About the same time, other creditors adjudged his estate, and these latter adjudications being purchased by the appellant's father, he was infest upon these titles, and entered into possession of the estate in 1672, and afterwards, in 1681, when the legal was about to expire, he obtained charter under the great seal, and was infest, whereby his right became irredeemable.

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Matters remained in this position, the tenant possessing the farm

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under the above lease and agreement, and paying the rent, &c. to the appellant's ancestors until the present action. The appellant brought this action to set aside the lease and agreement on the following grounds:—1. That the contract or deed of prorogation under reduction was a right of an anomalous nature, and not known in law. That it partook of the nature of a lease, also of that of a feu or right of property: That it was of the nature of a perpetual right in some places, and in other parts the right was to have an end, although where that end or ish was, nowhere appeared, it rather appearing to be indefinite as to the term of endurance. 2. That the above contract or agreement could not bind the pursuer or his predecessors, who were singular successors, because the prorogation therein contained was not commenced at the entry of the appellant's ancestor in 1672, and so possession was not then held under them as required by the act of Parliament 1449. 3. That the above deed of prorogation wanted a definite ish or termination, which is an essential part of every lease, and is required by the act of Parliament. 4. Without prejudice to these grounds of challenge, that the deed of prorogation was at an end, by the heir of the tacksman having for the space of years or thereby, lain out and tacitly repudiated his right and possession under it. 5. That an irritancy had been incurred by two terms' rent having ran into the third unpaid, which it was provided by that agreement, should forfeit and irritate the lease. It was answered by the respondent, That perpetual leases were sustained by the Court, against the granter and his heirs, and that therefore such leases must, by the act 1449, be effectual against singular successors, because the act meant to render effectual against the latter, every lease that was good against the former. Nor do such rights require infestment to make them binding against singular successors, possession being held as sufficient. Besides, the right was confirmed by prescriptive possession, and has been ratified or homologated by the appellant's ancestors, by acquiescing so long in the possession of the lease, and receiving the rents.

Feb. 19, 1771. The Lords, upon report of Lord Pitfour, "sustained the defences "propounded by the respondent, and assoilzie him and decern."

Mar. 8, — And on reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. The appellant stands fully vested in the real and complete right and property of the lands of Wardropertown, and is entitled to assume, hold, and enjoy possession of the same, and he cannot be excluded from that possession by the respondent, who has no right or pretension to the property of the lands, and who does not hold possession by virtue of any lease from the appellant, or his ancestors, or by virtue of any lease effectual or binding in law. 2. The appellant's ancestor acquired the lands as an onerous purchaser or successor in 1672, and no leases granted

by the former proprietor could be binding upon or effectual against him or his heirs, unless they were true or proper leases, such as are allowed by the act of Parliament 1449, which the deed of prorogation in 1642 was not. For, first, it sometimes bears the marks of a lease, sometimes of a feu-right, without being either the one or the other ; and it is not even properly a mutual contract, for the proprietor is bound to continue the lessee in possession, but the lessee is not made bound to possess or to give up possession. Second, the lease is devoid of the essential requisites of the act 1449, in respect of wanting possession upon it prior to the purchase, and also wanting a definite ish, or certain term of endurance. Third, The lease therefore was not binding on the appellant's ancestor, at least no longer than till the expiry of the prolongation of nineteen years current at his entry, so it cannot be binding upon the appellant by prescription. If the deed is considered as containing distinct leases or prolongations, there are not *termini habiles* for the plea of prescription, either positive or negative. If, on the other hand, it is considered as a perpetual lease, the positive prescription cannot have place, because there is no sasine or infeftment, as required by the act 1617, which regulates the law of prescription ; and, besides, as the deed in the above view is void as to the appellant's ancestor, it cannot by the principles of the law of Scotland be secured by the lapse of time, because *quod initio vitiosum tractu temporis conualescere non potest*. The negative prescription cannot take place because the respondent cannot plead the *positive*, and because the appellant and his ancestors might safely allow the lessee to continue in possession for any length of time, it was optional in them to do so, or to turn them out of possession ; and *res meræ facultatis non prescribuntur* ; besides, the negative prescription can take off only extrinsic legal objections, but cannot remove intrinsic defects, and the deed in the present case is intrinsically void as against the appellant's ancestor. Nor can that deed become binding or effectual by the homologation or ratification of him or his ancestors, because there is no evidence that the respondent's possession was held under the deed of prolongation, but there are strong legal presumptions to the contrary, arising from the deed of prorogation itself, and from the circumstances that none of the special conditions contained in it was ever performed—from the discrepancy between the rent actually received and the rent *due* by the deed, and from the general nature of the discharges, which refer to no right whatever ; and, 2nd, because, though the *possession* and payment of the rents had been entirely agreeable to the deed, yet there is no evidence that the appellant's ancestors knew of the right, or had such a perfect knowledge thereof as was necessary to constitute homologation, they being constantly abroad on military duty. But, even though homologation was made out, it could only render the lease good for the prolonged term of nineteen years then current at the time he acquired. And the respondent, by absenting himself

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four years after his father's death, must be held to have dereliquished the possession, consequently to have abandoned and discharged the deed itself. 4th. The deed is farther irritated, by allowing two terms' rent to run into the third unpaid. The lease expressly provides that it shall fall if such irritancy take place; and on this ground alone it ought to be set aside.

Pleaded for the Respondent.—1. The lease under which the respondent claims, and by virtue of which he and his ancestors have enjoyed the lands in question for upwards of 150 years, is formal, regular, and a proper lease, from nineteen years to nineteen years, so long as the lessee and his heirs paying the rent, and performing the covenants, shall choose to possess the farm. And leases of this kind are most undoubtedly binding on the granter and his heirs. 2. Though latent leases, upon which no possession had been obtained, may not be effectual against purchasers or singular successors; yet that cannot apply to the present case. The lease in question was not a latent deed; but the right upon which the respondent's ancestors were in possession of the lands at the time of the appellant's predecessor's entry in 1681, and under which the possession has been, uniformly and uninterruptedly enjoyed since that time downwards, and therefore cannot now be set aside at this distant period, but must remain a good title in possession to the respondent and his heirs, so long as he choose to possess, and continue to perform the covenants of the lease. 3. Whatever ground of challenge might have been competent to the appellant's ancestors in 1681, for setting aside the lease in question, yet *post tantum temporis*, no such challenge is now competent to the appellant, his ancestors having from that time downwards acquiesced in and homologated the right to possess, upon which the respondent claims, and which is now secured to him by the positive prescription; and any right of challenge formerly competent to the appellant's ancestor is lost and cut off by the negative prescription. 4. The respondent's right cannot in the least be affected by his not entering into possession *immediately* after his father's death. His being abroad on the king's service rendered it impossible for him to take up the possession, and it was sometime before he could know of the death of his father, and of his own right to the lands. The irritancy alluded to arose solely from the appellant refusing to take the rent when offered him.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors be affirmed, with £60 costs.

For Appellant, *Ja. Montgomery, Dav. Rae.*

For Respondent, *Alex. Wright, Andrew Crosbie.*

THE HON. JOHN DOUGLASS, an Infant, by his Guardians, *Appellant*;
THE EARL OF MORTON, *Respondent*.

1773.

DOUGLASS
v.
EARL OF
MORTON.

House of Lords, 20th January 1773.

DEED INFORMAL—EXECUTION BY NOTARIES—PRIOR OBLIGATION—

DEATH-BED.—By an antenuptial contract of marriage, the father became bound to provide his son John with a provision of £14000. In implement of this obligation, he had resolved to convey an heritable bond he held over an estate for £9000 *pro tanto* of this provision. The deed was all prepared and ready for execution, when he suddenly took ill of a disorder which deprived him of writing. He, however, resolved to have it executed by notaries, but only one could be got in London. Held, in a reduction to set aside this deed, as in prejudice of the heir at law, that the deed was ineffectual, as wanting the usual solemnities to convey heritage in Scotland.

The respondent was the eldest son of the late Earl of Morton by his first marriage. The appellant was his son by a second marriage.

In contemplation of this last marriage with Miss Heathcote, the parties entered into ante-nuptial contract of marriage, whereby the appellant's mother brought him a fortune of £12000, and the Earl, in consideration of the marriage, and of £12000, thereby bound and obliged himself to secure to the children of the marriage the sum of £26000 out of his estates in Scotland. If a son and a daughter, the event which happened, he bound himself to pay £14000 to the son, and £12000 to the daughter, at the first term of Whitsunday or Martinmas that should happen after his death, and after their attaining majority.

At this time, the Earl was seized and possessed of considerable estates in Scotland without entail, and a mortgage or wadset over the earldom of Orkney for £30,000, which was afterwards sold, and the money paid.

Of this date, he made a will, which recites the marriage settle- Aug. 2, 1766.
ment above mentioned, and, among other things, provided and directed that the £26000 above provided, should be divided among his two children of the second marriage, viz. £12000 to his daughter, and “£14000 to John Douglas, (the appellant) his son, and “that after his countess' death, the house in Brook Street, worth “£6000, should be sold and divided between his said son and daughter.”

Of this date, he executed another deed, settling the £30,000 on Oct. 16, 1767.
the respondent, by directing certain trustees, therein named, to purchase lands in Scotland with the said £30,000, and to take the conveyances of the same to the respondent, and the heirs male of his body. Of the same date, he executed an entail of his lands and lordship of Aberdour, as well as of two other estates in Scotland.

At this date, his personal estate was chiefly in England, and by a provision in the above deed, he declared that any subsequent purchase or purchases of land in Scotland, with that personal estate, should

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MORTON.
July 1768.
- go to satisfy *pro tanto* the above provision of £30,000. He purchased two parcels of land for £1417. 10s.
- In July 1768, the Earl, in order to increase his income, by a higher rate of interest, laid out part of his personal estate in the purchase of an heritable bond, on the estate of Pringle of Clifton for £9000, bearing interest at 4½ per cent. It was the intention of the Earl to convey this bond to the appellant in payment *pro tanto* of his provision.
- In preparing the deed of assignment, his agent wrote him from Aug. 1, 1768. Edinburgh to London, "If your Lordship continues your resolution of conveying *this debt* to Mr. John, in part of the provision *pro tanto* in your contract of marriage, the form of the deed to that purpose shall be sent."
- Aug. 19, — In answer, the Earl wrote, "I still continue my resolution of conveying the £9000 due upon the estate of Clifton, to my son John, in implement *pro tanto* of the provision made for him in my contract of marriage."
- Aug. 25, — His agent wrote, "Your Lordship is now infeft in Clifton's debt, and I shall send you a form of the conveyance to Mr. John in a post or two."
- Aug. 31, — The Earl answered, "I find I am now infeft in Clifton's debt, and shall expect the form of a conveyance of it to my son John."
- Sept. 13, — The agent sent the Earl "the form of a conveyance of Clifton's heritable debt to Mr. John, his heirs and assignees." He also asked to whom he wished the bond to go, failing John, and his Lordship wrote particular directions as to this; and his agent being from town, the letter was not answered until the beginning of October. The deed was then engrossed in London, and prepared for the Earl's execution. The Earl, however, before it was signed, was seized with a fatal illness on the 11th October, and the disorder increasing, the next day, 12th October, he sent his secretary to procure a notary, he being unable to write, in order to have the deed signed. Two notaries were necessary, but the secretary could only get one, and the deed was accordingly executed in that form, the notary declaring, "I, Kenneth Mackenzie, do subscribe these presents for him, as no other notary admitted by the Court of Session could be found."

The Earl died next morning, and the question here was. Whether the above deed, as so executed, was sufficient, by the law of Scotland, to carry the heritable bond. This was raised in a declarator brought by the appellant, and an action of reduction to set aside that conveyance, brought by the respondent; which two actions being conjoined, the Lord Ordinary ordered memorials to report the case to the Lords.

The respondent contended, 1. That the deed, 12th October 1768, being the conveyance of an heritable estate in Scotland, and not signed by the granter himself, but by a notary, only for him, is absolutely void and null, under the statute 1579. 2. That it was

also null and void, having been executed on deathbed, in prejudice of him, the heir at law.

The Lord Ordinary having ordered the letters above quoted to be adduced, the appellant answered, 1. That the Earl had done all he could to comply with the act 1579, in obtaining two notaries to execute his deed, but that being impossible, he complied with it as far as possible: That the Court of Session, in various cases, in cases of necessity, had sustained deeds so executed: That in transactions *inter rusticos* deeds, informal by the statute, were sustained; and clergymen have been allowed to act as notaries in the execution of last wills. That this indulgence has, in particular, been applied where the defect in form of the deed has proceeded from its execution in a foreign country. It being also founded on prior obligation, the strict rigour of the statutory rules has been dispensed with in such cases where there is no reason to suspect fraud. But, 2. At all events, this is clear law, that such a deed, executed in implement of a prior obligation contained in an ante-nuptial contract, is not challengeable on deathbed.

The Lords pronounced this interlocutor; "Conjoin the process of reduction at the instance of the Earl of Morton v. Mr. John Douglass and his Guardians, with process of declarator at their instance against the Earl; and as to the declarator, they sustain the defenses, assoilzie the Earl, and decern; and as to the reduction, they sustain the reasons of reduction, reduce, decern, and declare accordingly."

Against this interlocutor the present appeal was brought.

Pleaded for the Appellant.—The objection to the conveyance of the heritable bond to the appellant ought not to prevail in this case, because the want of a second notary was matter of necessity, from the impossibility of procuring more than one: That the law makes allowance for such circumstances, and in general dispenses with the omission of matters merely of form, rendered impossible by the situation in which the deed was executed, and particularly when executed out of Scotland. The law also allows of such deeds, if executed according to the law of the country in which they were so executed, and one notary being sufficient in England, it ought to be held good here: That the objection of deathbed ought not to be allowed to operate against a deed, which, though finally executed in that situation, had been determined, directed, and prepared, while the party was in perfect health: And the deed being executed in implement of the obligation contained in his father's marriage contract, was, by the law of Scotland, perfectly good, notwithstanding imperfections in form. And the various instruments executed by the Earl to regulate his whole succession ought to be considered as one general settlement, so as to support the conveyance of the £9000 heritable bond to him, though executed in the form in which it was executed.

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Sinclair v.
Merry, 1656;
Erskine v.
Ramsay, 1664.
Dict. of Dec.

Vide Jack v.
Jack. Dic. vol.
ii. p. 536.

Sutter v.
Crammond,
Ibid.
June 19, 1771.

1774.

THE
GOVERNORS OF
HERIOT'S HOS-
PITAL, &C.
v.
FERGUSON.

Pleaded for the Respondent.—The deed founded on is intrinsically null and void, and can make no faith, being defective in the essential and indispensable requisites established by the statute 1579, which requires “that all writings, importing heritable title, shall be signed by the parties, if they can write, otherwise by two famous notaries before four famous witnesses.” But the deed in question is signed only by one notary. Though our law will always give faith and effect to contracts and obligations, respecting personal estate made in conformity to the laws of other countries, yet that rule cannot hold in reference to the conveyance of heritable estate. 2. The deed, besides, is reducible, as having been executed on the head of deathbed, because, by the law of Scotland, no deed executed on deathbed can be allowed to hurt or prejudice the heir. 3. Besides, the £9000 heritable bond in question cannot be imputed in part payment of the trust money. And the correspondence which passed between the late Earl and his agent, in regard to conveying the bond to the appellant, cannot influence the question. In dispositions of real rights in prejudice of the heir, the intention of the disponent can only be gathered from the deed of conveyance; any other evidence is inadmissible. Besides, all that appears from the correspondence is, that the Earl had in contemplation to settle this heritable bond on the appellant, but came to no final resolution about it till the last moments of his life, when he was in extreme agony, and debarred from conveying heritable estate. 4. The circumstances of favour founded upon the supposed intention of the late Earl cannot be regarded, when the execution of that intention is totally incompatible with the rules of law.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For the Appellant, *E. Thurlow, Al. Forrester, J. Dunning, Thos. Lockhart.*

For the Respondent, *Ja. Montgomery, Alex. Wedderburn, Henry Dundas.*

(Mar. 12817.)

THE GOVERNORS OF HERIOT'S HOSPITAL,	.	.	<i>Appellants :</i>
WALTER FERGUSON, Writer, Edinburgh,	.	.	<i>Respondent.</i>

House of Lords, 2d March 1774.

SUPERIOR AND VASSAL.—Held, that the limitations expressed in a feu right are not to be extended beyond the express words.

The appellants, as superiors of the ground in the New Town of Edinburgh, feued to John Clelland, in 1734, five acres of their lands near to the Register Office. The feu right contained this clause, “That it shall not be leisom to the said John Clelland and his for-

“ said, to dig for stones, coal, sand, or any other thing within the
 “ said ground, nor to use the samen in any other way than by the
 “ ordinary labour of the plough and spade, without the express con-
 “ sent and liberty of the Governors of the said Hospital, had and
 “ obtained thereto for that effect.”

1775.

GREIG, &c.

v.

CARSTAIRS.

Clelland built several houses upon different parts of the ground so feued by him. He likewise sub-feued three parcels of the ground to persons who built houses thereon. Afterwards he sold the remainder to the respondent; and Mr. Ferguson having made known his design of erecting buildings in the form of a square upon his area, the governors, on the ground that this would interfere with the interests of the Hospital, brought the present action of declarator, to have it found and declared, in terms of the above clause, that the feuar could not use the said ground in any other way than by the ordinary labour of the plough and spade without their consent. In defence, it was contended that there was no express prohibition against building houses, or erecting dwellings on the ground, which in this case was the legitimate object of the feu. And the respondent was only taking the beneficial use of those rights which are naturally consequent on the power of disposal in the vassal. That the superior could not extend the above clause to limitations and restrictions not expressed; and that the general words of the above clause cannot in law go beyond the particulars expressed.

July 30, 1773.

The Court pronounced this interlocutor:—“ Find the defender,
 “ Walter Ferguson, is entitled to carry on his buildings on his own
 “ grounds mentioned in the declarator.” And on reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *Thos. Lockhart, E. Thurlow.*

For Respondent, *Alex. Wedderburn, Hay Campbell.*

ROBERT GREIG, ROBERT MARSHALL, JAMES BELFRAGE,	}	<i>Appellants;</i>
MICHAEL HENDERSON, and Others,		
JAMES BRUCE CARSTAIRS of Kinross,	.	<i>Respondent.</i>

House of Lords, 24th Nov. 1775.

CHARTER—CLAUSE AS TO PUBLIC BURDENS.—Charters granted by a superior contained clauses exempting the *feuar* from all public burdens imposed, or to be imposed. Held, that this did not exempt from the expense of repairing or building churches or manse.

The appellants were feuars, and held feu-charters, granted by the respondent's ancestors, superiors thereof, whereby they were freed
 “ of all public burdens and impositions imposed, or to be imposed,

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“ upon their lands, for whatever cause or occasion, in all time
“ coming.”

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When a new manse was built, demand was made against these feuars for their rateable proportion of the expense. In consequence, they sought relief against the respondent, contending that the above clause in their charters exempted them from the expenses of building or repairing churches or manses as public burdens. It was answered by the respondent, that the words “ public burdens ” legally comprehended land-tax, ministers’ stipends, and schoolmasters’ salaries, the only fixed and permanent taxes on land in Scotland ; but that this term, public burdens, did not include the rebuilding or repairing of churches or ministers’ manses, which is of a personal nature, and uncertain in its nature, event, and amount.

July 11, 1772. The Lord Ordinary found the appellants “ had no claim of
“ relief for any part of the expenses laid out by them in their re-
“ building or repairing the church, manse, or office-houses belong-
“ ing to the parish of Kinross ; therefore, repel the defence founded
“ on that claim, and refuse the desire of the representation.”

Jan. 23, 1773. On reclaiming petition, the Lords adhered. And, on second re-
Mar. 5, ——— claiming petition, and a third, the Court refused the prayers thereof.
Apr. 13, ———

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *Al. Wedderburn, Ar. Macdonald.*

For Respondents, *Henry Dundas, Al. Forrester.*

JOHN ROSS of Auchnacloich,	.	.	.	.	<i>Appellant ;</i>
MURDOCH MACKENZIE of Ardross,	.	.	.	.	<i>Respondent.</i>

House of Lords, 29th April 1776.

EXCLUSIVE TITLE — PRESCRIPTION — MINORITY — RES JUDICATA.—A deed was executed in favour of an infant, narrating that the granter was on the eve of going abroad, and conveying his estate. Thereafter debts were contracted by him, and a party having obtained right to certain adjudications over his estate, and obtained charter and infeftment thereon, and having thereafter obtained possession of the estate, and held it for more than forty years, held that the granter of the deed was not divested of the estate, and that the adjudging creditor had acquired an exclusive title by the positive prescription, and the minorities pleaded not sufficient to elide it. Also, that the decree formerly pronounced in the same matter was *res judicata*.

Alexander Mackenzie of Coul obtained judgment or decree of apprising against John Ross of Tollie, as charged to enter heir to his father, *Hugh Ross*, for the amount of four several bonds due by the father, and adjudging the lands of Tollie, and others therein mentioned, in payment and satisfaction of the accumulated sum of

£13,950 merks Scots, and 697 merks, 6s. 8d. of Sheriff's fee. The decree stated, "That the process of apprising having been reported, "seen, and considered by the Lords of Council and Session, they, "by decret of allowance, found the same orderly proceeded; and "therefore ordained letters to be directed to command and charge "the respective superiors of the said lands therein mentioned, to "infest the said Alexander Mackenzie of Coul, his heirs and assignees, to be holden of them respectively, as therein mentioned." Upon this decree of adjudication charter was obtained, and he was infest.

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Alexander Mackenzie also procured another decree of apprising of these lands in payment of four other bonds. And it was admitted that Alexander Mackenzie, under these titles, got soon thereafter possession of these lands, though the precise date was not ascertained.

Alexander Mackenzie of Pitglassie, the respondent's ancestor, purchased from the heir of Mackenzie of Coul, the subjects contained in these decrees of apprising; and, having made up and completed a proper title, entered upon possession of the whole of these lands of Tollie, except a parcel that had been given off in wadset prior to the apprisings, and that possession has continued ever since in Mackenzie of Pitglassie's descendants.

In 1650, Thomas Manson obtained a decree of apprising against the said John Ross, as charged to enter heir to Hugh Ross, his father, for the accumulated sum of £4560 Scots.

1650.

In 1652, Thomas Mackenzie of Inveraal likewise obtained a decree of apprising against the said John Ross for the accumulated sum of 6660 merks.

1652.

This John having, in 1653 and 1658, acquired right to the two last decrees of apprisings, brought an action in the Court of Session in 1662, against Mackenzie of Coul and Mackenzie of Pitglassie, setting forth, that by their *possessions* and *intromissions*, or receipts from the lands within the legal, the sums in the apprisings were satisfied and extinguished, and concluding for an account, and that they should be decreed to yield up possession.

1662.

The plaintiff, after some litigation, was allowed to prove his allegations, that the defendant's receipts had been sufficient to extinguish the sums in the apprisings, but did not proceed on the proof, stopt short in his proceedings, and during the remainder of his life, and part of his son John, a space almost of forty years, the respondent's ancestors enjoyed the estate unmolested and without challenge.

In 1708, Hugh Ross, (son of John Ross, the second of that name,) thought proper to revive that suit which had lain asleep since 1669, and was within a year of prescription. It was accordingly revived and transferred, but no further proceedings occurred.

1708.

Hugh Ross, in 1710, abandoning the above suit, brought an

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action of reduction and improbation of the two apprisings obtained at the instance of Mackenzie of Coul.

The respondent's grandfather, then in possession of the estate, appeared in this action, and, by virtue of his titles before stated, exhibited the charter and infeftment called for by the action; and pleaded, that having been in possession by virtue of these titles for upwards of forty years, his right was protected by prescription under the act 1617.

In reply, it was pleaded, that prescription was interrupted by the former action of declarator and count and reckoning. It was answered for the defendant, that he admitted that the action of declarator of extinction of the apprisings and counting within the legal was not prescribed; but as that action necessarily implied an *acknowledgment* of the defendant's right and title, it could not save from prescription.

Feb. 3, 1714. The Court "sustained the defence of prescription, as to all other grounds of reduction and nullities, except those particularly libelled in the count and reckoning and falsehood."

Feb. 24, — On reclaiming petition, the Court adhered. On going back to the Ordinary, the pursuer still insisted that the defender should make the production called for. And the Lord Ordinary being of this opinion, ordered this to be done. The defender then represented against this interlocutor, and the Lord Ordinary ordered this to be answered; but nothing further occurred for forty-two years.

June 3, —
July 28, —

Hugh Ross, in the action of 1710, was succeeded by his son John. And, on John's death, without issue, the appellant's father, Robert Ross, succeeded to his elder brother.

1756. In 1756, Robert Ross brought another action to revive that of 1710, but nothing farther was done.

1772. In 1772, the appellant, son of Robert, revived and transferred the old action of 1710 against the respondent. It occurred to the respondent that the original action was prescribed and out of Court; but the Lord Ordinary being of a different opinion, the old action proceeded at the point where it was dropped.

July 24, 1773. The Lord Ordinary pronounced this interlocutor: "Finds, that
" the interlocutor of the Court in 1714, by which the defence of
" prescription is sustained, as to all other grounds of reductions and
" nullities, except those particularly libelled on in the former process of count and reckoning, and which was adhered to, and not
" reclaimed against in due time, is a final interlocutor as to that
" point, and therefore finds the pursuer's plea, founded on the supposal it was still open for him to insist, in the same way that he
" might were there no prescription run, is not competent; and with
" respect to the pursuer's plea that prescription is interrupted by
" minorities, which it is not disputed, is still competent for him,
" Finds, that he has not brought sufficient evidence in support
" thereof; and in respect, 1. It does not appear that he can found

“ on any part of the 20 years’ minority of Hugh, the son of John
 “ the second ; for though there is a disposition by John, the father
 “ to Hugh, who was at the time a child a year old, there is no evi-
 “ dence, nor by the words of the disposition, that it was delivered to
 “ any body on the child’s account ; and as it proceeds on the recital
 “ that the father was going abroad, which it was clearly proven he
 “ did not, every circumstance concurs to show that it was never out
 “ of the father’s power ; and as he lived till after the son’s majority,
 “ the minority of the son cannot aid the pursuer ; and, 2dly, The
 “ pursuer cannot plead on the twelve years’ minority of John the
 “ second, supposing these proved, as the right did not at that time
 “ stand in John, but in Balnagowan, as a proper purchaser ; and,
 “ therefore, upon the whole, sustains the defences, assoilzies, and
 “ decerns.”

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On representation, the Lord Ordinary adhered. And on reclaiming Dec. 11, 1773.
 petition to the Court, “ The Lords adhere to the Lord Ordinary’s in-
 “ terlocutor, in so far as it finds the interlocutor of the Court, of the
 “ 3d Feb. 1714, is a final interlocutor, and is to be held a *res judicata*,
 “ and in so far refuse the desire of the petition. But in respect of
 “ certain new productions, made on the part of the petitioner, and
 “ which were not before the Lord Ordinary, they remit to his Lord-
 “ ship to hear parties thereon.”

After memorials were given in, the Lord Ordinary, in a special Mar. 2, 1775.
 interlocutor, found prescriptive possession run ; and also that the
 minorities pleaded were not sufficient to interrupt that prescription.”

On reclaiming petition, the Court finally adhered to the Lord Or-
 dinary’s interlocutor.

Jan. 31, 1776.

Against these interlocutors the present appeal was brought to the
 House of Lords.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be
 affirmed.

For Appellant, *Alex. Wedderburn, Alex. Murray, Ilay Campbell.*

For Respondent, *E. Thurlow, Henry Dundas, Ar. Macdonald.*

ALEX. DUKE OF GORDON,	.	.	.	.	Appellant;
SIR JAMES GRANT, Bart., COLONEL JAMES GRANT,					} Respondents.
COLONEL ALEXANDER GRANT, the EARL OF FIFE,					
and Others	.	.	.	.

House of Lords, 22d March 1776.

CRUIVE DYKES—CRUIVE FISHING—FLOATING TIMBER DOWN A RIVER.—

Circumstances in which a party was held to have a cruiue fishing, and entitl-
 ed to erect dykes for that purpose, but so as not to obstruct the floating down
 the river to the sea, the wood and timber belonging to the superior heritors.

This was a dispute between the appellant and the respondents be-

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GRANT, &c. ing heritors on the banks of the river Spey, as to the right of cruive fishing in that river claimed by the appellant, and which the respondents contended he had not; action was brought to declare their respective rights.
- It was stated that the former Duke of Gordon had raised action to have his right of tugnet fishing in the sea at the mouth of the river Spey, and likewise to have his right to a currach, cobble and spear fishing in the said river declared; but no conclusion was made as to a cruive or dyke fishing.
- July 14, 1727. The Court of Session then pronounced this interlocutor: "Find the Earl of Moray, and other pursuers, have the only right of salmon fishing in the river Spey, from the Pot upwards to the Burn of Inchneil; and that they may use the same with cobbles or currachs as they may think fit; and that the Duke of Gordon has no right of fishing within the bounds aforesaid. And also find that the Earl of Moray and the other pursuers have a right of fishing with currachs only from the Burn of Inchneil to Balhagartygaven; and that the Duke of Gordon hath right to fish with cobble, currach, or *otherways*, within the said bounds, and decerns and declares accordingly." The Court afterwards altered the words *or otherways*, to "or in any other lawful way," by interlocutor of July 27, — 27th July; and under this, the defenders contended that it could never mean to extend to a cruive or dike fishing.
- This interlocutor was affirmed on appeal.
- In 1733, however, a new action was raised by the respondents against the Duke, to have it found that he had no right to a cruive fishing, which he insisted on. In this action the Court finally pronounced this interlocutor: "Find that charter 1684, containing a novodamus, gives the Duke a sufficient title to cruives sub saxo de Ardewhish, reserving to the heritors to be heard before the Ordinary how far the said charter gives a right to cruives at any other part except only at the saxum de Ardewhish; and also how far the said charter could give a right to cruives, in prejudice of other heritors who had *anterior* rights of fishing upon the river sub saxo de Ardewhish; also adhere to the same interlocutor, finding that by law the Duke cannot build cruives upon sands or shoals in fresh water."
- July 20, — The Lord Ordinary, in terms of the remit thus made to him, found that the Duke must "demolish and pull down all braes and dykes used by him upon the Water Spey above the saxum de Ardewhish." But no judgment was given upon the other points.
1756. Sir Ludovick Grant brought an action in 1756 against Sir Robert Gordon declaring his right to salmon fishing on the river Spey opposite to his lands, and that the defender had no right to erect cruives or yairs, braes and dykes, or other unlawful engines, for fishing in the water of Spey, to the prejudice of his right. To this action the Duke of Gordon, and the Earls of Findlater and Fife were afterwards sisted as parties; and Sir Ludovick brought also an action against them

on the same grounds. In consequence of the Duke of Gordon being a minor, the guardians prevailed on the pursuer to delay the proceeding until he came of age.

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A new action was then brought by the respondents to have it found that the Duke of Gordon had no right or title to erect cruives, braes, or other engines, and that the channel of the river ought to be laid open and all obstructions removed.

The Court of Session finally pronounced this interlocutor: “ Find Aug. 10, 1775. “ the defender, the Duke of Gordon, is not entitled to have cruives, “ braes, or dykes, upon those parts of the river Spey within which “ the crown had granted rights of fishing to other heritors before the “ date of the Duke of Gordon’s charter 1684. And therefore or- “ dain the cruives, braes or dykes already erected within that space “ to be demolished. And decern and declare accordingly. And “ find it unnecessary to determine at present that point relative to “ the floating of the timber.”

The Lord Ordinary ordered the cruives and dykes to be demolish- Nov. 2, 1775. ed. All have accordingly been removed, except the appellant’s Dec. 21, — cruive dyke.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be reversed, and the cause be remitted* to the Court of Session to proceed upon the foundation of the respective rights of the parties, ascertained and established by the interlocutor of the 14th July 1727, and declarations there made.

For the Appellant, *Al. Wedderburn, Alex. Murray, Robt. M^cQueen, Arch. M^cDonald.*

For the Respondent, *E. Thurlow, Henry Dundas, Ilay Campbell.*

JOHN GILLON,	.	.	.	.	.	<i>Appellant ;</i>
CATHERINE MUIRHEAD & HUSBAND,	.	.	.	.	.	<i>Respondents.</i>

For report of this case, see Morison, p. 15286. It is said by Professor Bell (Com. vol. i. p. 76, n. 1.) that the case was affirmed on appeal ; but the Compiler has not been able to find any such appeal, nor any trace of it in the Journals of the House of Lords.

* Under this remit, the Court of Session found the Duke entitled to a cruive fishing, and to erect cruive dykes, but so as to leave the river open to allow the respondents to float their timber down at certain seasons of the year. And, on appeal to the House of Lords, this judgment was affirmed. Vide vol. II. p. 582, ante.

1789.

<hr style="width: 50px; margin-bottom: 5px;"/> SCOTT v. CREDITORS OF SETON.	WM. and JAMES DOUGLAS, SIR G. COLEBROOKE & Co.	<i>Appellants ;</i> <i>Respondents.</i>
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This case is reported in Mor. p. 1605, 18th July 1780, and is stated by Professor Bell (Com. vol. i. p. 416, n. 2.) to have been affirmed on appeal ; but no appeal case has been found, and no trace of it in the Journals of the House of Lords.

[M. 13,371.]

WALTER SCOTT, CREDITORS of HUGH SETON,	<i>Appellant ;</i> <i>Respondents.</i>
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House of Lords, 7th April 1789.

JUDICIAL SALE—HERITABLE DEBTS, EXTINCTION OF.—Held that the debts affecting a bankrupt estate, sold at a judicial sale, are, upon payment of the price, extinguished to every effect except that of securing the purchaser.

The bankrupt estate of Appine having been purchased at a judicial sale by Mr. Seton, on the creditors receiving payment out of the price, conveyances of their debts were made over in trust, for the behoof of Mr. Seton, to the appellant Mr. Scott, his agent and man of business. Mr. Scott thereafter laid out considerable sums of money on Mr. Seton's account ; and for his security of those sums Mr. Seton executed deeds, by which he consented and declared, that Mr. Scott should continue vested with the rights to the Appine debts until those due to himself were paid. Alexander Farquharson, the heir of the cautioner for the price of the estate, then obtained from Mr. Scott a disposition to the Appine debts, for the sole purpose of securing his relief as to the cautionary obligation.

In this situation, Mr. Seton became bankrupt, and, in a ranking and sale brought by his creditors, Mr. Scott claimed a preference over the other creditors, on the ground that there was no *ipso jure* extinction of debts affecting an estate, and that the act 1695, framed for the benefit of purchasers at a judicial sale, could not be construed to limit his rights at common law.

July 10, 1788. On report to the Court, they held, that the debts affecting a bankrupt estate conveyed to the purchaser at a judicial sale, are extinguished to every other effect except that of securing the purchaser.

On appeal to the House of Lords, this judgment was affirmed.

For Appellant, *J. Abercromby.*

For Respondents, *J. Clerk.*

[Mor. 4964.]

1791.

HELEN RUTHERFORD or SCOTT, Widow of WM. SCOTT of Newcastle,	} <i>Appellant ;</i>	SCOTT v. JERDON, &c.
ARCH. JERDON, (formerly called JERDON CAVERHILL), and JEAN JERDON his Sister, Infants, by their Guardian, and THOMAS CAVERHILL, Jedburgh,		
	} <i>Respondents.</i>	

House of Lords, 23d Feb. 1791.

REDUCTION OF DEEDS—FRAUD AND INCAPACITY.—Held that deeds granted by a person 95 years of age, subject to attacks of palsy, and where the memory was a good deal impaired, were sustained ;—the deeds having been executed several years before his death, and before these shocks and impaired memory had appeared.

The appellant was the heir at law, and next of kin of the late Archibald Jerdon of Bonjedward, her uncle : She brought the present action before the Court of Session to set aside and reduce the will of her said uncle, executed by him, whereby he conveyed his whole real and personal estate to the respondents, who were the children of a natural daughter of the deceased, to whom he had a strong attachment, and who had been brought up in his house from infancy.

The grounds of the reduction were, 1. That at the time the deeds were executed, the said Archibald Jerdon was through age, and the effects of a paralytic disorder, so much reduced in point of intellect, as to be incapable of giving directions for executing his will, and was in a state liable to be led by any person who happened to be about him, and was totally incapable of judging for himself, or forming any deliberate will of his own, or understanding the import of any such. 2. That the deeds so executed were fraudulently impetrated from him by the respondents, or some of them, or by persons employed by them. Thus incapacity and fraud were the grounds of the reduction.

The Lord Ordinary having allowed a proof.

It was proved that the maker of the deed had had a severe stroke of the palsy before executing the deed—that he was 95 years of age. The doctor who attended him for six years before his death, stated about three years before his death that he had a stroke of the palsy, and that he attended him :—“ that he did not continue very long ill
“ of that disease, and he recovered perfectly of it in point of bodily
“ health ; but he had upon him at the same time a scorbutic erup-
“ tion, which continued for years, and for which and other complaints
“ the deponent continued to attend him to the time of his death.
“ That after he recovered the said stroke of palsy, Mr. Jerdon, in
“ the intervals of his illness, appeared to the deponent to converse
“ rationally and sensibly enough ; but that he had more shocks of
“ the palsy than one ; namely, one in 1784, which was the first, and

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“ after that he had several other slight shocks : That at these times
 “ he appeared to the deponent to be considerably affected both in
 “ point of judgment and memory, but more in point of memory than
 “ judgment, being at a loss for words to express his ideas : That
 “ some of these shocks were so slight as to be got the better of in a
 “ day or two ; and that there was no shock that he can remember
 “ of between 1780 and 1784 : That between the years 1780 and
 “ 1784 Mr. Jerdon did appear to him to be capable of ordinary
 “ business : as also that he appeared to the deponent tenacious of his
 “ own opinions, and attentive to his own interests.”

Mr. Jerdon died in 1786, at the advanced age of 95. And the three deeds executed were dated respectively in 1778, in 1781, and a third testamentary deed 25th September 1783.

Nov. 17, 1789. The Court repelled the reasons of reduction.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—Although it is certainly a just rule, that effect should be given to the *ultima voluntas testatoris* even to the exclusion of the lawful heirs ; yet, on the other hand, the best and the wisest may be reduced to such a state of weakness, in which situation advantage may be taken, by the artifice of designing and officious men. The law is properly careful to preserve the succession of persons labouring under such weakness of understanding, and therefore the utmost jealousy is to be entertained of deeds of settlement executed in the circumstances of the present deed. At the time these deeds were executed, it is established by the proof that Mr. Jerdon was incapacitated both in mind and body, and this, added to the fraud and circumvention, ought to be sufficient to set them aside. Under the head of circumvention, it is not necessary to prove such a degree of it as would have deceived even a person of sound understanding. But that it is enough if such a degree of incapacity is proved as makes the person evidently liable to be acted upon by that specific degree and kind of artifice and influence which are also proved to have been exerted against him. Even supposing total incapacity were not proved, and that Mr. Jerdon had still flashes of reason and partial restoration, yet, it is undeniable his mental capacity was impaired, and the will obtained by the arts of strangers who were about him at the time. In many instances the Court of Session have set aside deeds on similar grounds. Thus in the case of *Dallas v. Dallas* in 1773, the deed was reduced on proof of weakness on the part of the granter, and circumstances of undue influence on the part of those who obtained the deed in prejudice of the nearest heirs. In the case of *Trotter v. Trotter*, in 1774, the will was set aside, although in favour of the nearest heirs, because it had been procured by importunity and fraud. In the case of *Macarthur*, the chief ingredient in the proof was that the father, who was the daughter's heir, was kept at a distance ; and there was no proof of previous instructions to execute the deed, emanating from Miss Macarthur her

self. And in *Brown against Chalmers*, where the judgment of the Court of Session was affirmed in the House of Lords, the chief circumstance in the cause was, the interference of a writer, who used arguments with his employer, a man far advanced in life, and rendered weak by disease, and by habits of intemperance, though, at the time of executing the will, he was quite sober, and the will was read to him. In the case of *Crawford of Doonside* there was no bad intention of any kind; but Mr. Crawford had delayed too long the important business of making his will. He relied upon very honourable gentlemen, who were present when he put his name to it, without being able either to read or hear it read, and the will was set aside.

Pleaded for the Respondents.—There are two points. 1st. Incapacity. 2d. Fraud. As to the first, the only point of time at which it is material to inquire into the state of Mr. Jerdon's health and understanding is the date of the will. What he was before, or what he became after, is of no consequence, provided that at that date he was of sound disposing mind. But the appellant's evidence, avoiding that particular period, takes a range of several years, and, picking up scanty anecdotes of infirmity or occasional mental debility during parts of that period, imagines this is enough. She has proved the deceased had a stroke of palsy in 1780—that he continued more or less under it till May 1781—that though he then recovered completely, he had a second attack in 1784, and others at different times. But there is no evidence that he was ill at the date of these deeds. As to his not being able, after the first stroke, to express himself with that ease and fluency as formerly, the respondent is willing to admit this, but that can never go to establish incapacity. On the contrary, down to the date of his death in 1786, he continued to enjoy the full possession of his mental faculties for a man of his years. In regard to fraud, the whole is founded upon the mere supposition that she, being the deceased's heir, he must have had a predilection for her, unless some fraud had been used; but the whole circumstances showed that he had never any intention of favouring her, and that this predilection was in favour of his natural daughter, in whose favour every deed that was made was executed. The last will was in favour of her infant children, who could not be participant or privy to any fraud or scheme whatever, and the agent chosen to execute this deed was a man of established character in the first rank of his profession. On all these grounds, therefore, there was not sufficient evidence to set aside the deed.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For the Appellant, *T. Erskine, J. Anstruther.*

For the Respondents, *Sir J. Scott, Rob. Blair, Alex. Abercromby.*

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[Mor. 4215.]

HENDERSON v. HENDERSON.	SIR JOHN HENDERSON, Bart., ROBERT BRUCE HENDERSON, Esq.,	Appellant ; Respondent.
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House of Lords, 11th May 1791.

FIAR OR LIFERENTER—ENTAIL—CONDITION.—1. Circumstances in which, though an estate belonged originally to the wife, and was taken to her and the husband in conjunct fee and liferent, failing whom to the wife's heirs, and failing them to the heirs and assignees whatsoever of the husband, that the fee was in the latter, and that he was entitled to make entail with the condition therein specified. 2. In this entail, the condition was, that when the estate of Earshall came into the family of Fordell, the heir of Fordell was not to hold both estates, but Earshall estate was to go to the next heir. Held, this condition good, and that the heir of Fordell was bound to denude in favour of the next heir.

Robert Bruce of Earshall held his estate of Earshall under a destination to heirs male ; but having himself no heirs male, and there being issue of his body four daughters, he executed a deed upon the narrative, that as the estate was considerably burdened with debts, he had resolved that what of the same was free, after paying these debts, should, failing heirs male of his own body, belong to the heirs female of his body, viz. to his four daughters successively, and the heirs of their bodies, whom failing, to his sisters and the heirs of their bodies ; the eldest daughter always to succeed without division, and to exclude heirs portioners.

The estate, at the date of this settlement, was loaded with debts, equal to or exceeding its value, so that Robert Bruce, the granter, had little more than the name. The substantial right in the estate was vested in a number of creditors, who had adjudications thereon, some of which were completed by charter and sasine, and the legals long expired.

Robert Bruce died in 1768 without male issue. His eldest surviving daughter, Helen Bruce, did not think it expedient to make up titles by serving herself heir of provision under the above settlement, or to enter into possession ; but a creditor, after obtaining charter and sasine, and decree of expiry of the legal, and decree of mails and duties against the tenants, entered into possession.

Helen Bruce was thrice married ; 1st, to David Baillie. Mr. Baillie, by the assistance of his father, acquired right during the subsistence of the marriage, to several of the most considerable of the debts affecting the estate, particularly to the adjudication above-mentioned. He died in 1726, leaving one son, who also died soon thereafter. His eldest brother served heir to him, and thereby acquired right to the debts and adjudications affecting the estate of Earshall ; all of which he made over to his father, James Baillie, W.S., who

Jan. 30, 1728, by virtue thereof entered into possession, and levied the rents.

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By contract between the said James Baillie and Mrs. Helen Bruce, his widowed daughter-in-law, he agreed upon the narrative that the debts contained in David Baillie's bonds, paid by the father after the son's death, with other debts due to him by his son, and what the father had paid out for him and the maintenance of his widow and family, after deducting all intromissions with the rents of Earshall, amounted to £3108; Mr. Baillie, for the love and respect he bore to his daughter-in-law, became bound and obliged, in part payment of the said sum, "to make over the said estate, and any
 " other lands which belonged to the deceased Sir Andrew Bruce,
 " and Andrew Bruce of Earshall, his son, with all right, title, and in-
 " terest he had thereto, with the haill debts affecting the same, stand-
 " ing in his favour, and that in favour of the said Helen Bruce and
 " her heirs and assignees; but reserving to him, the said James
 " Baillie, and his foresaids, the rights and securities of the said
 " estate, and the possession thereof, for security of, and till he should
 " be fully paid off the foresaid mentioned sum with interest."

Mrs. Helen Bruce in 1730 married her second husband, Mr. James Henderson, granduncle to both parties in this cause; She entered into a contract of marriage, and in place of conveying her interest in the Earshall estate, she bound and obliged herself to pay him, her husband, 80,000 pound Scots, an obligation upon which it was intended that he should raise adjudication, and by this means obtain possession of the estate.

In order to fortify still further his right, another contract was entered into by him with Mr. James Baillie, in terms somewhat similar to those in Baillie's contract with Mrs. Helen Bruce.

Soon after Mr. Henderson executed a settlement, bearing,—“ For Feb. 1733.
 “ the love and favour which I have and bear to Mrs. Helen Bruce,
 “ my spouse, do hereby assign and dispone to myself and her, in
 “ conjunct fee and liferent, for her liferent use allenary, in case she
 “ survive me, and if there happen to be an heir or heirs existing
 “ of the marriage betwixt us, and to the heirs of the marriage be-
 “ tween us in fee; and in default of issue of the marriage betwixt
 “ us two, to such of us as shall survive the other, and to such surviv-
 “ or's heirs or assignees whatsoever, all right, title, and diligence, that
 “ I have already acquired, and shall happen to acquire, either in my
 “ own name, or in the name of any other person or persons to my
 “ use and behoof, of or concerning the lands and estate of Earshall.”

In order to complete the above plan, which had been settled at the time of the marriage, of vesting in Mr. Henderson the right to the estate of Earshall, or at least to the reversion thereof, it was afterwards concerted, in consequence of the advice of counsel, that his spouse and her two sisters, under the character of heirs-portioners to their father, should concur in granting a bond to the amount of 100,000 pounds Scots in favour of George Lock, as trustee for Mr. Henderson, the bond to contain *in græmio* a declaration that it had

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been granted for the sole purpose of enabling Mr. Lock to lead an adjudication of the estate, which would be an effectual title of property, and to convey the same to Mr. Henderson. A trust-bond was accordingly granted, qualified by stating the purpose for which it was so granted, namely,—“that by adjudication, or such other
 “method as is competent by law; and that the said George Lock,
 “or his heirs, who shall have established such titles, shall denude
 “thereof, to and in favour of me, the said Mr. James Henderson,
 “and me the said Mrs. Helen Bruce, in conjunct fee and liferent,
 “and to the *heirs of his body* to be procreate betwixt him and me,
 “the said Helen Bruce; which failing, to and in favour of me, the
 “said Helen Bruce, and the heirs to be procreated of my body of
 “any subsequent marriage: which failing, to and in favour of me,
 “the said Elizabeth Bruce the sister; which all failing, to the said
 “Mr. James Henderson, his heirs and assignees whomsoever.”

Upon this bond George Lock obtained an adjudication of the estate of Earshall for payment of the sum in the bond, amounting with penalty to 712,500 pounds Scots.

Thereafter Mr. Lock executed a deed divesting and denuding himself, and stating, that seeing the said trust bond was only granted to me on trust “*for behoof of the said James Henderson.*” “There-
 “fore, wit ye to have sold, alienated, and disposed, to and in favour
 “of the said Mr. James Henderson, and Helen Bruce his spouse,
 “and the longest liver of them, in conjunct fee and liferent, and
 “failing either of them by decease, to the heirs and assignees of the
 “survivors heritably under reversion, according to act of parliament,
 “all and whole the said lands.”

Sept. 30, 1737. Before obtaining this conveyance from Mr. Lock, another settle-
 ment had been executed, by which Mr. Henderson assigned to Mrs.
 Helen Bruce, his spouse, the contract and agreement entered into by
 him with Mr. James Baillie, with full power to her, “immediately
 “after my decease, not only to enter into possession, but to intromit
 “with, uplift, and receive the rents, &c.” This settlement, like the
 former one, reserved *full power to revoke* or alter at any time during
 the granter’s life. It has been asserted that both were delivered to
 Helen Bruce during the granter’s life, and the respondent has no
 occasion to dispute the fact.

In 1738 Mr. Henderson having implemented his part of the con-
 tract above mentioned with Mr. Baillie, by finding security for the
 balance of the 36,000 merks which he was bound to pay by that
 contract, he (Mr. Baillie) with consent of his son, executed a formal
 disposition, which, after reciting the various debts and diligences af-
 fecting the estate, with the progress thereof into Mr. Baillie’s person,
 proceeds in these terms:—“And seeing Mr. James Henderson of
 “Earshall has made payment and satisfaction to me of a certain
 “sum of money, for my granting these presents, whereof I grant the
 “receipt; therefore, wit ye me with consent foresaid, to have sold,

“ &c. ; likeas, I hereby sell, &c. to and in favour of the said Mr. James Henderson, his heirs and assignees whatsoever, all and haill the foresaid lands.” It conveyed also the debt and diligence.

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Upon these titles thus acquired, Mr. Henderson obtained charter of adjudication and resignation of the lands under the great seal, in these terms,—“ Dilecto nostro Jacobo Henderson de Earshall, fratri germano demortui Domini Joannis Henderson de Fordel Baroneti, ejusque hæredibus et assignatis quibuscunque.” And he was infeft.

April 1739.

He then executed a deed in the form of a strict entail, whereby he bound himself to resign the said lands in favour of “ myself and Helen Bruce, my spouse, in conjunct fee and liferent, and the heirs of my body in fee ; which failing, to the heirs of her body of any future marriage ; which failing, to Elizabeth Bruce, his wife’s sister, and heirs of her body ; which failing, to Margaret Bruce, (also her sister) and the heirs of her body ; which failing, to her husband, Captain William Henderson, my brother germain, and the heirs of his body ; whom failing, Sir Robert Henderson of Fordell, Bart., and the heirs of his body ; which failing, any other heirs I shall hereafter nominate and appoint by a writing under my hand ; and failing such appointment, to my own nearest heirs and assignees whatsoever.” This entail provided, that when the estate came to the Hendersons of Fordell family, that the estate of Earshall and Fordell should be held by separate heirs, and in that event Earshall should devolve on the next heir. It also contained the usual prohibition against selling or contracting debt, protected by irritant and resolute clauses ; and the entail was recorded.

June 1740.

Mr. James Henderson died in 1741 ; and thereupon his widow entered into the possession of the estate. She afterwards married Walter Wemyss of Lathacker.

1741.

But Helen Bruce having died in 1774, Sir Robert Henderson, the nephew of Mr. James, being then the nearest heir under the above entail, made up titles to the estate, as heir of tailzie and provision to his uncle ; and upon the general service which carried to him the unexecuted procuratory in the deed of entail, he expedite a charter from the crown, and entered into possession of the estate.

1774.

The said Sir Robert Henderson had two sons, Sir John the appellant, and Robert the respondent. In terms of the condition of the above entail, the respondent behoved to succeed to Earshall, his elder brother taking Fordell. But this obligation was not implemented, and accordingly Sir John, when he succeeded, entered into both estates of Earshall and Fordell.

Action was then brought by the respondent to have him to make up titles, and to denude in favour of the respondent.

The appellant’s defence was twofold :—1st, That Mr James Henderson had no power to make an entail of Earshall, the property or right of fee thereof not having been vested in his person, but in the

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HENDERSON. person of Helen Bruce, his spouse, or at least held in trust for her behoof; 2d, That supposing James Henderson's right were unexceptionable, still there was no obligation upon Sir Robert Henderson, or upon the appellant, as representing him, to give up the estate to the respondent in the event which has happened; for that the clause in the entail, obliging the heir in possession of the estate of Earshall to denude in favour of the second son, was only applicable to the case of an heir holding the estate of Earshall under the entail, and who should afterwards succeed to the estate of Fordell, whereas Sir Robert was proprietor of the estate of Fordell long before he succeeded to the estate of Earshall, and is so described in Mr. Henderson's entail.

Jan. 21, 1790. The Lord Ordinary ordered memorials, and reported to the Court. Upon the report of Lord Rockville, the Court pronounced this interlocutor:—"The Lords repel the defences stated for the defender, and decern and declare in terms of the libel with respect to the pursuer's right to the lands and estate libelled, and the defender's making up legal titles thereto, and denuding thereof in favour of the pursuer, in terms of the entail libelled on; and with respect to the other conclusions of the libel, remit the cause to the Lord Ordinary to proceed therein as to his Lordship may seem just."

June 1, 1790. Upon reclaiming petition this judgment was adhered to. Against these interlocutors the present appeal was brought. After hearing counsel, it was Ordered that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

NOTE.—It is noticed in the House of Lords Journals, that no appellant's case was printed.

For the Respondent, *Sir John Scott, Robert Blair, Wm. Tait.*

NOTE.—On going back to the Court of Session, Sir John having refused to make up a legal title, Mr. Bruce Henderson was obliged to take decree of adjudication, and completed title thereon. Thereafter being advised, that as he had taken the Earshall estate, not as an heir of tailzie nor by a service in that character, but as a disponee under the injunction of Mr. Henderson's deed; and as the prohibitory and irritant and other clauses in that deed were imposed singly upon the heirs of tailzie, and not upon a disponee taking the estate under the clause of devolution, that he was entitled to hold the estate in fee-simple. But the Court sustained the entail.—*Vide Sess. Papers, 12th Nov. 1796.*

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—— (3.) Question Whether the accruing interest in an adjudication belongs to the heir or executor?—Held, in a question of compensation, that the interest accumulated and accruing, in an adjudication, is heritable, and belongs to the heir, and therefore did not fall under the husband's *jus mariti*.—Sinclair v. Young, &c., 20th March 1787, p. 64.
—— (4.) A creditor had adjudged,

and, upon expiry of the legal of the adjudication, had obtained possession of the lands, which possession continued for more than forty years, but no charter or infeftment had followed on the adjudication; and upon this, the creditor pleaded a prescriptive and irredeemable right. Held, in an action raised by a co-adjudging creditor, that the first adjudging creditor was still liable to account, and that prescriptive possession on an adjudication, of which the legal was declared to be expired, did not give an absolute right of property without charter and infeftment.—Gillespie and Reid v. Hussey or Bogle, and Husband, 3d May 1793, p. 305.

ADJUDICATIONS.—(5.) If intimation be given in the first effectual adjudication, in order that creditors may be conjoined, it is no objection to any posterior adjudication (so as to disappoint them of their proper place in a ranking,) that no intimation, in terms of the statute, was given, the want of such intimation not being a nullity.

—Du Roveray and Others (creditors of Redcastle) v. Mackenzie and Others, 1st June 1795, p. 409.

—— (6.) Succession to, in particular circumstances.—*Vide* Heritable or Moveable, and Approbate and Reprobate.

ALIOQUIN SUCCESSURUS.—*Vide* Domicile, No. 3.

ANTE-NUPTIAL CONTRACT.—Question argued whether the parties can agree to cancel and discharge an ante-nuptial contract after the marriage.—Donald v. Kirkaldy or Donald, 8th April 1788, p. 105.

—— When there is a *jus crediti* to the children by such deed.—*Vide* Jus Crediti et Provision

APPEAL.—(1.) Competency of.—*Vide* Jurisdiction.

—— (2.) Held an appeal to the

House of Lords incompetent, both in the circumstances of the case, and also under the standing orders of the House of Lords, which makes appeals incompetent after the lapse of five years.—Honourable Archibald Frazer v. His Majesty's Advocate, and Simon Frazer, Esq., and others, 23d November 1795, p. 425.

APPARENT HEIR.—Held, although a deceased father had left his whole estate to trustees, who were infeft, that his heir was still entitled to be enrolled as possessing a good freehold qualification—the trustee's possession being held for him.—Speirs v. Sir A. Campbell, 5th March 1791, p. 201.

APPRENTICE.—An apprentice having bound himself to one Company, and, on its dissolution, his services having been transferred to another Company; Held by the terms of his agreement he was bound to serve the new Company. Young v. Brown & Co., 7th June 1785, p. 42.

APPROBATE AND REPROBATE.—Circumstances in which a party having taken benefit under his father's will for many years, was held not entitled to reprobate the same.—Martin and Attorney v. Martin, &c. 17th June 1795, p. 425.

ASSIGNATION to a co-surety paying the debt.—*Vide* Heritable Security (1.)

ASSIGNERS IN LEASE.—*Vide* Lease.

AUGMENTATION OF STIPEND.—Held, that the Court of Session, granting once an augmentation to a minister of the parish, is not precluded, as commissioners of teinds, from afterwards granting a second augmentation—this being within the jurisdiction and powers of modification conferred on the Court.—Minister of Tingwall v. Officers of State, 22d May 1789, p. 140.

BANK AGENT.—Circumstances in which the agent of a Bank, having entered into a transaction for the behoof of the bank without special instructions, did not bind the bank.—Moncrieff, &c. v. Dunlop, &c., 17th July 1797, p. 595.

BANKRUPTCY.—*Vide* Sale.

BANKRUPTCY OF LANDLORD.—Tenant's rights as tenant and as a real creditor of the landlord.—*Vide* Landlord and Tenant—Retention of Rent—Heritable Security.

BANKRUPTCY.—*Vide* "Sale" and "Delivery."

BILL.—(Negotiation) Circumstances in which it was held, that a bill granted in room of a former bill, and apparently in security, was not exempted from the strict rules of negotiation; and this having been neglected by the holders of the new bill, the acceptors and indorsers of the original bill were not liable in payment, notwithstanding they had, by a letter under their hand, agreed to remain liable.—Reid, King, and Co., and Wilson and Co. v. Arch. and John Coats, 21st Feb. 1794, p. 326.

—— (2.) Question, Whether from the stipulation of "bills at three months" in a contract of sale, the seller was entitled to discountable bills, or bills that would produce ready cash in the market, and entitled to stop the delivery of further goods, unless this was granted.—*Vide* Sale.

—— (3.) Terminus a quo in reckoning the sexennial prescription.—*Vide* Sexennial Prescription.

BOTTOMRY BOND.—An hypothec does not attach for repairs executed while the ship is in a home port.—Wood and Co., &c. v. Hamilton, Hunter's trustee, 15th June 1789, p. 148.

BURGH ELECTION.—(1.) *Vide* Competency of Suit.

—— (2.) Held by the Court of Session, that non-resident burgesses of a burgh, were not eligible to be elected councillors or magistrates of the burgh, but reversed in the House of Lords.—Johnstone and Others, magistrates of Anstruther Easter v. Alex. Tenant and Wm. Gray, Members of the town council of said burgh, 28th April 1785, p. 22.

—— (3.) Held, that in the election of the magistrates of a burgh, the provost and the other councillors need not be resident burgesses, or inhabitants of the burgh; but that the

bailies and office-bearers must be chosen from amongst the burghesses resident. Also held that the town-clerk of the burgh is incapable of holding said office, and at same time of holding the office of one of the magistrates of the burgh.—Sir Hector Munro, provost, and other members of the town-council of Nairn v. Forbes and Others, burghesses of Nairn, 3d May 1785, p. 23.

—— (4.) An ordinary meeting of council of the burgh of Dumbarton, taking place the day after the death of one of their number, the majority at this meeting, without any previous notice, proceeded to elect a new councillor in the room of the one deceased, though objected to by the minority: Held that this election was void, and that 14 days' notice must be given to every councillor previous to such election, although it appeared from the records of the burgh that it had been the practice for nearly a century, to proceed to the election without any such previous notice.—Denny and others, Councillors of Dumbarton, v. Marquis of Lorne, &c., 6th Dec. 1796, p. 516.

CAPTURE.—Held, where the vessel belonged to a neutral, but was bound for Cadiz with a cargo of hemp to that port, at the time Spain was at war with Great Britain, and was captured by an English privateer and taken into Leith, and detained there for some considerable time without proceeding to have her condemned as lawful prize, or the ship's papers, master, and crew examined, that the capture was illegal, and the owner of the privateer liable in demurrage and damages from the date of the capture to the day in which the vessel was freely given up, and made fit to proceed on her voyage.—Major Michael Fallijeff, and Sir Wm. Forbes, his attorney, v. Hon. Mr. Elphinstone and J. Gardner, 14th Aug. 1784, p. 356. *Vide* Demurrage.

CAUTIONER.—*Vide* Relief.—Correi Debendi.

CASUS AMISSIONIS.—*Vide* Proving the Tenor.

CHARTER and SASINE.—A charter and sasine expedite as flowing from the crown, contained a destination by error of the writer, in terms different from its warrant. Held that these deeds were to be interpreted according to their warrant, and good and valid.—Drummond v. Drummond, 20th April 1797, p. 557.

CLAUSE IN BOND.—(1.) *Vide* Heritable Security.—Retention of Rent.

—— (2.) of Dispensation in Charter.

—An objection being stated to a sasine, that the dispensation clause granted by the crown, making infestment on one part of the lands good for the whole, was inept, in respect that these lands were held of different superiors. This objection repelled, prescription having run upon the title. Affirmed without prejudice to any challenge appearing on the face of the sasine, 13th May 1726, of the lands of Kirkbryde, this reservation being made with consent of the respondent.—Mrs. Jane Whiteford v. James Whiteford, 15th March 1788, p. 101.

—— (3.) of Dispensation.—*Vide* Dispensation Clause.

—— (4.) in Entail.—*Vide* "Heira Male" and "Entail."

—— (5.) *Vide* Entail.

—— (6.) in Trust Deed.—*Vide* Substitution, or Conditional Institution; and Succession.

—— (7.) of Reservation of Mines, &c.—*Vide* Superior and Vassal.

—— (8.) of Reservation.—*Vide* Lease of Coal.

—— (9.) Exemption Clause in Statute.—*Vide* Statute.

—— (10.) *Vide* Executry.

COLLEGE of JUSTICE.—Held that the Members of the College of Justice were not liable in assessments for support of the poor within the city of Edinburgh.—Magistrates of Edinburgh v. College of Justice, 23d Mar. 1790, p. 155.—But *Vide* 8 and 9 Vict. c. 83, which makes them liable.

COLLATION.—*Vide* Domicile et Executry.

COMMON AGENT.—Circumstances in which a petition and complaint against a common agent for his removal from that office was not sustained; and that the judicial sale ordered by the Court was not irregular, though it was alleged that the ranking and sale was at an end, and no process calling for the interference of the Court at that time in dependence.—*York Buildings Company v. Bremner, &c.* 19th June 1797, p. 586.

—— in Ranking and Sale.—*Vide* Ranking and Sale.

COMPENSATION.—*Vide* Retention.

COMPETENCY OF APPEAL.—*Vide* Appeal.

—— OF SUSPENSION.—*Vide* Suspension.

CONDITION CONTRA LIBERTATEM MATRIMONII.—A lady having formed an attachment to a person whom she was on the eve of marrying, her father, the testator, executed a codicil to his will, whereby he declared, that if she were so married to that person she should not be entitled to any share of the residue of his estate. They were married: Held, by the Court of Session, that this was a condition *contra libertatem matrimonii*, and not to be regarded. Reversed in the House of Lords, on the ground that the deceased's will fell to be construed according to the law of England, and that the condition in the codicil was not unlawful, but to be considered as a revocation of his former bequest to his daughter.—*Ommanney, &c. v. Douglas or Bingham, &c.* 15th March 1796, p. 448.—*Vide* Domicile.

—— *Vide* Entail. No. 4.

CONSTRUCTION OF STATUTES.—*Vide* Statutes.

CONCEALMENT.—*Vide* Insurance.

CONTRACT.—Non-Fulfilment. A written contract for building a circus, to be finished and ready for opening on the 11th Nov. 1792, under a penalty of £500, was entered into: Held it not a breach of this contract entitling the party to damages, that the circus was not finished for five or six weeks later than the time stipulated.

—*Jones v. Lindsay & Co.*, 17th May 1797, p. 563.

COPARTNERY.—An agreement dissolved a company, and transferred the retiring partner's interest in stock, &c. of the concern to the remaining partners, but provided that he was still to have a share of the profits of the concern. In a question with creditors: Held, that a person so retiring was still a partner of the firm, and liable as such.—*Boulton and Others v. Mansfield, Ramsay, & Co.*, 18th April 1787.

—— Dissolution of.—*Vide* Title to Sue.

CORREI DEBENDI.—*Vide* Relief among Cautioners.

CRUIVE DYKES.—Circumstances in which a party was held to have a cruive fishing in a river, and entitled to erect cruive dykes, but so as not to obstruct the floating of timber down to the sea.—*Duke of Gordon v. Grant*, 22d March 1776, (App.) p. 679.

CUSTOM OF BURGH.—*Vide* Burgh.

DAMAGES.—Circumstances in which a party who had filed an indictment of perjury in England against a party in Scotland, and afterwards obtained sentence of outlawry against him, was held liable in damages, with £740 of expenses, and £200 of costs of appeal for illegal and oppressive proceedings.—*Lidderdale v. Dobbie*, 10th March 1797, p. 555.

—— IN WORKING COAL.—*Vide* Superior and Vassal.

—— FOR DISMISSAL FROM SERVICE.—*Vide* Master and Assistant.

—— FOR NON-FULFILMENT.—*Vide* Sale.

—— *Vide* Demurrage.

—— FOR SCANDAL.—*Vide* Husband and Wife.

—— *Vide* Wrongous Imprisonment.

DEATHBED.—In a reduction of deeds executed on deathbed, by a person who lived fifty-nine days and two or three hours thereafter. Held, that the rule *dies inceptus pro completo habetur*, did not apply to such case, and that by the statute 1696,

the sixty days, consisting of twenty-four hours each, beloved to be complete, in order to cut off the objection of deathbed.—*Mercer v. Sir John Ogilvy, Bart. and Others*, 1st March 1796, p. 434.—*Vide* Nomination of Heir.

DECREE OF SALE.—Held, that a decree of sale gave a good title to the purchaser obtained in a sale brought by creditors who had led adjudications against the estate which was entailed, but the entail had lain dormant for forty years, and was prescribed.—*Black & Grant v. Gordon, &c.* 5th Feb. 1794, p. 317. *See* Entail.

—— IN FORO.—*Vide* Suspension.

DEFAMATION.—*Vide* Veritas Convicii.

DELICTS OF WIFE.—*Vide* Husband and Wife.

DELIVERY OF DEED.—*Vide* Trust-Deed.

—— OF GOODS ON EVE OF BANKRUPTCY.—*Vide* Sale.

DEL CREDERE COMMISSION.—Held, that such a guarantee not only covers the sales of goods effected, but also warrants the remittances made as the proceeds of those sales.—*MacKenzie and Lindsay v. Scott*, 19th Dec. 1796, p. 525.

DEMURRAGE.—Held, where the capture of a vessel by a privateer was illegal, that the owner was liable in demurrage and damages from the date of the capture to the day on which the vessel was freely given up. And that demurrage was due at the rate of 10s. per ton per month of the vessel's tonnage : Also, that a premium of insurance for £5337, the sum for which the cargo on board was insured, as well as damage for the ship's repairs sustained since capture, and damage sustained after she set out, by running on the coast of Ireland, &c. were due.—*Major Fallijeff and Sir William Forbes, his Attorney v. Hon. Mr. Elphinstone, &c.* 12th March 1794, p. 356.

—— (2.)—A claim was made by the owner of a vessel against the freighters, for demurrage on account of the detention of the ves-

sel beyond the time stipulated. Held, that the claim of demurrage ceases on the day of her sailing from her loading port ; and though the vessel was obliged to put back after being two days at sea, and finally frozen in for the winter, that this was a *casus fortuitus* falling on the owners, and not on the freighters of the vessel, and for which the latter could not be held liable, reversing the judgment of the Court of Session.—*Jamieson & Co. v. Laurie*, 10th Nov. 1796, p. 493.

DEVIATION FROM RULE OF CROPPING.—*Vide* Lease.

—— *Vide* Insurance.

DISABILITY OF COMMON AGENT TO PURCHASE.—*Vide* Judicial Sale.

DISCHARGE OF LIGITIM.—*Vide* Ligitim.

DISPENSATION CLAUSE.—(1.) *Vide* Clause.

—— (2.) CLAUSE. Held, that the terms of a dispensation clause in a charter were sufficient to authorise infestment at the place mentioned in the charter for any part of the lands, as well as for the whole.—*Morehead v. Edmonstone*, 28th Feb. 1791, p. 199.

DIVORCE.—*Vide* Proof.

—— *Vide* Proof.

DOMICILE (1.) An officer in the East India Company's service made several remittances home, with a view of returning to his native country, Scotland. Further remittances were on their way home, to the extent of £5708, when he died in India. He left other estates in India worth £2193, and, together with other remittances to London, his whole personal estate amounted to £9000. Held in the Court of Session, and affirmed in the House of Lords, that India was his domicile at the time of his death ; and that, according to the law of England, his personal estate fell to be distributed.—*Bruce v. Bruce*, 15th April 1790, p. 163.

—— (2.) A Scotsman by birth. left his country early in life, and settled in London, and married an English lady there. He acquired a large fortune, and purchased the estate of Newliston in Scotland, to which

he sometime thereafter retired and died there. Held, that the personal succession of the deceased fell to be regulated by the *lex domicilii* at the time of his death, which was Scotland, and included both the English funds, as well as those in Scotland.—*Hog v. Lashley and Husband*, 20th April and 7th May 1792, p. 247.

DOMICILE (3.) A party by birth a Scotsman, having a family estate in Scotland, and possessing a lucrative government appointment there, had, for eleven years before his death, lived in London, and died there intestate, possessing £60,000 of personal estate in England, and a small personal estate in Scotland. Held, that his niece, who succeeded to his heritable estate in Scotland by special deed, not of him, but of her grandfather, was also entitled to claim her distributive share of the deceased's whole personal estate, without collating the heritable estate to which she had succeeded, insomuch as she claimed the said share of the personal estate by the law of England, where the deceased had his domicile at his death.—*Hay Balfour, &c. v. Henrietta Scott, &c.* 10th April, 1793, p. 300.

—— (4.) A Scotsman by birth, residing in England, executed a will in the English form, leaving the residue of his estate to his younger children equally among them. The testator had left Scotland at twelve years of age, and entered the navy. He was all his life in various services, and latterly in the British navy. He had a house at Gosport, where he most commonly resided when at home. He owned two houses in Edinburgh, and sometimes visited Scotland. The visit, immediately before his last, he staid ten months with his sister at Olive Bank. Having thereafter received the command of the fleet at Halifax, before leaving, he took a hurried visit to his sister and children in Scotland, where, two days after his arrival, he died of apoplexy. Held, reversing the judg-

ment of the Court of Session, that England was the domicile of the deceased, by the law of which must the rights of parties under his will be regulated.—*Ommanney, &c. v. Douglas or Bingham and Husband*, 15th March 1796, p. 48.

ELECTION WITHIN BURGH.—*Vide* Suit.

—— (2.)—*Vide* Burgh (2.)

—— (3.)—*Vide* Burgh (3.)

—— (4.)—*Vide* Voting—Freehold Qualification.

—— (5.) Held, where objection is stated to the title to be enrolled, and to vote for a member of Parliament, the complaint must be followed up within four months, in terms of the act 16th Geo. II. c. ii. —*Elliot v. Pringle*, 5th March 1792, p. 237.

ENTAIL. (1.)—A party made an entail, reserving power to alter. He afterwards altered, and made a new entail, differing in destination from the first, with a clause merely referring to, but not inserting the prohibitory, irritant, and resolute clauses in the first entail. Held, that this entail was insufficient to protect against creditors.—*Patterson, &c. v. Broomfield*, 19th May 1786, p. 50.

—— (2.)—Held, in a question brought by the purchaser of the estate in the above entail as to the validity of the title, upon the supposition that though declared bad against creditors, it might be a good entail against the sale of the estate. Held, the entail ineffectual to prevent a sale of the estate.—*Cuthbert, &c. v. Pattersons*, 23d April 1787, p. 76.

—— (3.)—*Vide* Succession and "Heirs Male."

—— (4.)—A lady made an entail of her estate in favour of a certain series of heirs, under this condition, that her sister, Elizabeth, "shall execute a tailzie of her half of the estate, according to the same order of succession." She executed an entail, but not exactly to the same series of heirs, although favouring the party intended. Held, in the Court of Session, that the condition was virtually complied with. Reversed

in the House of Lords.—Rocheid v. Sir David Kinloch, 22d March 1790, p. 152.

ENTAIL (5.)—Circumstances in which held that an entail having lain dormant for more than forty years, was prescribed.—Black and Grant v. Gordon and Others, 5th Feb. 1794, p. 317.

— (6.)—Circumstances in which, by the terms of a destination in an entail, with certain powers reserved, that the entailer still held the fee-simple of the estate, and on his attainder was forfeited to the Crown.—Hon. Archibald Frazer v. Simon Frazer, Esq. and Others, and his Majesty's Advocate, 23d November 1795, p. 425.

— (7.)—*Vide* Prescription, 4, 5, et 6.

— (8.)—An entail was made, and charter and infeftment passed thereon, some years before the act 1685, regarding the recording of entails. Held, that in order to protect against creditors, such an entail must be recorded.—Earl of Roseberry v. The Creditors of Hugh Lord Viscount Primrose, 3d April 1767, App. p. 651.

— (9.)—An entail was executed of an estate, with prohibitory, irritant and resolute clauses, directed against the contraction of debt, or burdening the estate, or selling or alienating the same. A subsequent heir of entail having contracted debt, a succeeding heir of entail applied to the Court for liberty to sell part of the estate for payment thereof. Held, that by the conception of the entail, the pursuer could not sell for payment of debts. Affirmed in the House of Lords, on the special ground that the debts were contracted since the death of the entailer contrary to his intention, without prejudice to the question if the debts had been contracted by the maker of the entail.—Earl of Roseberry v. Fowles and Others, creditors on the Primrose Estate, 4th May 1770, (App.) p. 654.

— (10.)—In an entail, there was this condition inserted, that when the estate of Earshall came

into the family of Fordell by succession, the heir of Fordell was not to hold both estates, but that Earshall was to go to the next heir. Held this condition good, and that the heir of Fordell was bound to denude.—Henderson v. Bruce Henderson, 11th May 1791, April p. 686.

EVIDENCE.—*Vide* Proof.

EXECUTRY. (1.) Held, where a party succeeded to the heritable estate of the deceased in Scotland by special deed, not of the deceased, but of her grandfather, that she was entitled also to her distributive share of the deceased's personal estates in England without collating, because, by the laws of England, where the deceased was domiciled at the time of his death, she was entitled to such distributive share.—Hay Balfour, &c. v. Henrietta Scott, &c., 10th April 1793, p. 300.

— (2.) — *Vide* Taciturnity.

— (3.) A clause, in a postnuptial contract conveyed all the moveable goods, gear, and effects, belonging to the party at death. Held, the clause not to carry debts and sums of money, bank notes, &c., but only the *ipsa corpora* of moveables.—Earl of Fife v. Mackenzie, &c. 6th March 1797, p. 559.

— (4.)—*Vide* Rents.

EXECUTION OF DEEDS BY NOTARIES.—*Vide* Solemnities.

— (2.) Circumstances in which a deed executed on deathbed in London, only by one notary, because a second notary could not be found, and which conveyed heritable estates in Scotland, was held ineffectual.—Douglas v. Earl of Morton, 20th Jan. 1773, App. p. 671.

EXPIRY of the LEGAL.—*Vide* Adjudication (3.)

ERROR IN SUBSTANTIALIBUS OF LEASE.

(1.)—*Vide* Lease.

— (2.) In a condition inserted in a will by a father against his daughter marrying a certain person named, he was described as being the son of John Moody Bingham in place of Isaac Moody Bingham. Held, that this did not invalidate the condition.—Ommancey, &c. v.

Douglas or Bingham, 15th March 1796, p. 448.

ERROR IN SUBSTANTIALIBUS OF LEASE.

(3.) In a judicial sale, the teinds were represented in the memorial and abstract, and in the advertisements of the sale of the estate, to be valued, and to be exhausted, and subject to no further burden from stipend. After the purchase was completed, an informality was discovered in the subvaluations, which deprived the lands of the exemption of such burdens: And, in action raised by the purchaser for a proportional abatement of the price: Held, the purchaser not entitled to abatement, as there were no *mala fides* on the part of the seller.—*Ferguson v. Mossman and Anderson*, 17th Feb. 1797, p. 531.

—— (4.) As to the nature of a debt.—*Vide* Heritable or Moveable, (2.)

FACTOR.—Held, where a foreign merchant was commissioned to purchase flax for a merchant in Dundee, the former was not liable for the loss of the flax by fire which he had purchased, though he had not intimated the purchase to his employer; the flax being only part of the quantity ordered, and was put into a store waiting the arrival of a vessel to take it to Dundee.—*Sturrock and Stewart v. Wm. Porter, &c.*, 27th March 1786, p. 45.

FEE or LIFERENT. (1.) Circumstances in which, though an estate belonged originally to the wife, and was conveyed to her and the husband in conjunct fee and liferent, failing whom to the wife's heirs, and failing them to the heirs and assignees whatsoever of the husband, that the fee was in the latter, and that he was entitled to make an entail with the condition therein specified.—(*Vide* Entail, (10.) *Henderson v. Henderson*, 11th May 1791, App. p. 686.

—— (2.) Circumstances in which, by the terms of a destination in an entail, with certain powers reserved, that the entailer still held the fee simple of the estate, and, on his at-

tainer, was forfeited to the crown. *Frazer v. Frazer and His Majesty's Advocate*, 23d Nov. 1795, p. 425.

FEE-DUTIES.—*Vide* Superior and Vassal.

FIAR.—A father conveyed his estates to his heir male, whom failing, to his eldest daughter. The heir male, after the death of the father, succeeded, but died without issue, having, previous to his death, conveyed the estates to a remote relation: Held, that being fiar, he was entitled to convey the estates.—*Whiteford v. Whiteford*, 15th March 1788, p. 101.

FICTITIOUS VOTES. — *Vide* Voting, Qualification.

FISHING.—*Vide* Cruive Dykes.

FORCE and FEAR.—*Vide* Lease (9.)

FOREIGN.—*Vide* Domicile.

—— (2.) Circumstances in which held, that certain bonds due to creditors in England, by an English company, which were ranked on an estate in Scotland belonging to that company, had incurred the negative prescription of 40 years. Reversed in House of Lords, *Delvalle v. York Buildings Co.* 12th March 1788, p. 98.

—— (3.) Administrators. — Held in the special circumstances of this case, that English administrators residing in England, acting under an English will, proved in the prerogative court of Canterbury, in reference to an estate in Grenada, were not liable to be called to account in the supreme court of Scotland.—*Ferguson &c. v. Douglas, Heron & Co.*, 11th Nov. 1796, p. 503.

FORUM.—*Vide* Foreign, No. 2.

FRAUD, Presumptive and Positive.—*Vide* Sale.—Bankruptcy.

FRAUDEM CREDITORUM.—*Vide* Trust Deed.

FRAUD.—*Vide* Lease (9.)

FRAUD and CIRCUMVENTION. — *Vide* Reduction of Will.

FRAUD and INCAPACITY.—*Vide* Reduction of Deeds.

FREEHOLD QUALIFICATION. — *Vide* Qualification.

FUGÆ WARRANT. — *Vide* Wrongous Imprisonment.

GAME.—Held that there was no law which entitled a person to enter the uninclosed grounds of another proprietor to shoot game, although the game itself was *res nullius*, and common to all; as this did not prevent the owner of the ground from debarring all and sundry from entering his grounds, to the prejudice of his exclusive right of property.—*Livingstone v. Earl of Breadalbane*, 13th April 1791, p. 221.

GESTIO PRO HÆREDE.—A father had conveyed his whole estate, heritable and moveable, to his *third* son, who, in recovering, found an heritable debt of £60, which was not specially embraced in the conveyance. To remove objections to his title to receive and discharge the debt, the father's eldest son, and heir at law, consented to sign the discharge along with his brother. Held that this subjected him in the passive title of *gestio pro hærede*. But in the House of Lords case remitted back for consideration, and to adduce proof that, at the date of the discharge, his brother was in right to receive the debt of £60.—*Clerk v. Gordon*, 9th March 1787, p. 61.

GIFT.—A party had made his will in India, appointing executors in this country to execute the same after his decease. Previous to his death he had expressed a desire to remit a certain sum, £1000, to his father, by a friend who was intending soon to return to this country, and whom he wished to take home the money to his father. His friend ultimately got the sum to take home for that purpose, but accounts of the donor's death reached England before delivery of the money. In this case the executors under the will claimed the sum. Held that the father was entitled to the money, the gift being absolutely completed during the life of the donor.—*Bruce, &c. v. Stewart*, 3d March 1790, p. 150.

GOODS IN COMMUNION.—*Vide Legitim.*

GUARANTEE.—Held that a *Del Credere* commission not only covers the sales of goods effected, but also warrants the remittances made as the pro-

ceeds of those sales.—*Mackenzie & Lindsay v. Scott*, 19th Dec. 1796. p. 525.

HEIR APPARENT.—His right.—*Vide Apparent Heir.*

HERITABLE OR MOVEABLE.—(1.) In a question whether the accruing interest in an adjudication belongs to the heir or executor; Held that the interest accumulated, and accruing, in an adjudication, is heritable, and belongs to the heir, and did not fall under the husband's *jus mariti*.—*Sinclair v. Young, &c.*, 20th March 1787, p. 64.—*Vide infra.*

———— (2.) A party domiciled in England, executed a will in the English form, leaving only a life-rent of part of his estate to his heir at law, his eldest son, remainder to other heirs. The residue of his real estate "*not by him otherwise disposed of*," he bequeathed to his three younger sons, equally between them. No special mention was made of three several bonds, upon which adjudication had been led; and, on the supposition that they were moveable, the eldest son concurred in granting a discharge. But, sixteen years afterwards, he raised a reduction of the discharge, and claimed the bond debts as heritable estate, which an English will could not carry. Held that as he had taken benefit under his father's will so long, he could not approbate and reprobate the same.—*Martin v. Martin, &c.*, 17th June 1795, p. 421.

———— (3.) *Vide Legitim, Government, and Foreign Funds.*

———— (4.) An heritable bond was granted, and adjudication led thereon for principal and arrears of interest. Circumstances in which it was held that the large arrears of interest thus constituted did not go to the heir, but to the executors, reversing the judgment of the Court of Session.—*Willock, &c. v. Ouchterlony*, 30th March 1772, App. p. 659.

HERITABLE SECURITY.—(1.) A creditor held an heritable security for repayment of his advances, to the

extent of £12,000. He also held an adjudication debt against the same debtors for a bank debt paid by him for them, which was not included in the heritable bond. On the bankruptcy of the debtors, and ranking and sale of their estate; Held, that he was entitled to impute indefinite payments made to him to his least secured debt, so as to make the heritable bond cover the whole debts due to him within the amount of that security; and, therefore, that he was preferable both for the balance due on the bond debt, as well as for the adjudication debt. In this last debt another party was bound as co-surety; Held, on payment, he was not bound to grant the creditors an assignation to his claim. —Bank of England v. Pulteney, 14th Dec. 1787, p. 92.

HERITABLE SECURITY (2.) Held that an heritable security granted for future advances, was of no force for sums advanced subsequent to the date of the infeftment. —Newnham, Everett and Co. v. Stewart, 25th Mar. 1791, p. 345.

———— (3.) The security for a cash credit consisted of an assignation and conveyance to a former heritable security for the sum of £12,000, but the estate vested by that security was assigned and conveyed over, without any mention in the deed of the sum (or cash credit), in security of which it was conveyed. Held that the security was of no force or effect for the advances made before the date of the infeftment, in consequence of its being a security for an indefinite amount. —Newnham, Everett & Co. v. Stewart, 10th March 1794, p. 347.

———— **DEBT.**—*Vide* Landlord and Tenant—Retention of Rent.

———— Held that the debts affecting a bankrupt estate, sold at a judicial sale, are, upon payment of the price, extinguished to every effect except that of securing the purchaser. —Scott v. Creditors of Seton, 7th April 1789, App. p. 682.

HEIRS PRIMARILY LIABLE.—(1.) Several estates belonging to the same

ancestor, were together conveyed in security of debt by heritable bonds. Part of the estate descended after his decease to the heir of line, and another to the heir male; Held, reversing the judgment of the Court of Session, that the heir male has not relief against the heir of line, in so far as the bonds are charged on his estate. —Rose v. Rose, &c., 2d April 1787, p. 66.

HEIRS PRIMARILY LIABLE. (2.) Held, in a question of relief between an heir of entail and an heir of line, that the heir in possession is bound to keep down the interest of the debts due on the estate during his possession; but for a jointure paid by him to the deceased's widow, which was not repaid to him from any of the surplus rents remaining after deducting the said interest, he was entitled to relief against the heirs of line succeeding to his unentailed estates. Remitted for consideration. —Sinclairs, &c. v. Threipland, &c. 27th March 1789, p. 113.

———— (3.) Heirs Whatsoever, how interpreted. —*Vide supra* (1.)

———— (4.) Heirs Male. —*Vide* (1.)

———— (5.) Nomination of; Held a deed not to contain any appointment or nomination of an heir sufficient to carry the estate. —Mercer v. Sir J. Ogilvy and others, 1st March 1796, p. 434.

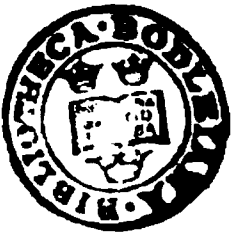
———— (6.) Circumstances in which the words "*heir male*," in an entail, received a strict technical interpretation, though in other parts of the deed they had been used in a different sense, and described as "*heirs male of the bodies*." —Hay v. Hay, 25th May 1789, p. 142.

HERRING FISHERY.—Circumstances in which the mode of fishing practised by the fishers, did not entitle them to claim the Government bounty. —Edgar, &c. v. Miller, 9th June 1797, p. 575.

HOMOLOGATION —(1.) *Vide* Legitim.

———— (2.) *Vide* Ranking and Sale (No. 3.)

HUSBAND and WIFE.—An action of damages for scandal was brought against a married woman, calling her



husband for his interest : and judgment with expenses pronounced against her. The Court of Session held the husband liable for the expenses of process (£688), reversed in the House of Lords, and held him liable in expenses, only in so far as he was responsible for the conduct of his defence, as this might be found to be malicious, vexatious, or calumnious ; and remit made to enquire into this. *Baillie v. Chalmers*, 6th April 1791, p. 213.

HYPOTHEC.—(1.) Held that no hypothec attaches for repairs on a vessel executed while the ship is in a home port.—*Wood and Co. v. Hamilton*, 15th June 1789, p. 148.

— (2.) In a question, whether the crown is preferable to the landlord's hypothec ; Held in the Court of Session, that the landlord is preferable. Reversed in the House of Lords.—*Ogilvie v. Wingate*, 13th June 1792, p. 273.

— (3.) Held, the landlord by virtue of his hypothec, preferable to a purchaser in a sale of corn by sample effected in open market, although the claim was not made *de recente*, but after an interval of two years.—*Smart v. Hon. Walter Ogilvy*, 26th Oct. 1796, p. 490.

INCAPACITY, MENTAL.—*Vide* Reduction of Will.

INCUMBRANCES.—In a sale of subjects, held, that the purchasers were not bound to pay the price, until certain incumbrances were purged, affecting the purchase.—*Bruce v. Cleghorns*, 2d March 1785, p. 5.

INDEFINITE PAYMENTS.—Held, a party entitled to impute indefinite payments made to him to his least secured debt.—*Vide* Heritable Security, (1.)—*Bank of England v. Pulteney*, 14th Dec. 1787, p. 92.

— **SECURITY.**—In security of a cash credit, an heritable security for the sum of £12000 over an estate was assigned, without mentioning in the deed of conveyance and assignation, the sum for which it was so conveyed. Held that the security was of no effect, it having been granted

for an indefinite amount.—*Newnham, Everett, and Co. v. Stewart*, 10th Mar. 1794, p. 347.

INFORMAL WRITING.—*Vide* Lease.

INSURANCE.—(1.) Circumstances in which presumed knowledge and concealment of the arrival of news of the capture of the vessel insured, before the insurance was effected, held to vacate the policy.—*Stewart and Co. v. Dunlop and Others*, 8th April 1785, p. 14.

— (2.) A vessel was insured from Virginia to Rotterdam, "with liberty to call at a port in England." She sailed direct for Hull, and was lost on her voyage from that port ; Held by the Court of Session, that a voyage from Virginia to Rotterdam with liberty to call at a port in England, gave a liberty to call at any port in England, and therefore to call at Hull. Reversed in the House of Lords, and case remitted to pass the bill.—*Laird v. Robertson and Co.*, 20th April 1791, p. 232.

— (3.) In the above case, it being found that a policy from Virginia to Rotterdam, with liberty to call at a port in England, only entitles to call at a port in England that may be within the due course of the voyage to Rotterdam, and not at any port in England out of the due course of the voyage. The vessel having sailed direct from Virginia to Hull, Held under the remit, that this was a different voyage from that insured.—*Robertson and Co. v. Laird*, 8th March 1796, p. 443.

— (4.) Held, where a vessel was insured on her voyage home from a foreign port, that the concealment of two letters of advice, which represented the vessel to be unseaworthy, and weakly manned, and that she had been boarded in a sinking state, were facts material to the risk, and not having been communicated, the policy was voided. Also that the delay of the vessel at Elsinore and Stromness amounted to a deviation from the due course of the voyage.—*Campbell, &c. v. Russell & Co.* 4th March 1794, p. 340.

INTERRUPTION.—*Vide* Prescription (1.)

INTERRUPTION.—(2.) *Vide* Sexennial Prescription.

————— (3.) *Vide* Prescription (3.)

INTEREST.—Circumstances in which the mode of calculating interest on bygone rents approved of.—York Buildings Co. v. Mackenzie, 14th June 1797, p. 579.

————— *Vide* Adjudication (2.) (3.)

INTIMATION.—*Vide* Adjudication (4.)

INVENTORY.—*Vide* Tutors and Curators.

IRREDEEMABLE RIGHT.—*Vide* Adjudication (3.)

IRRITANCY OF LEASE.—*Vide* Lease (9.)

JURISDICTION.— (1.) The Court of Session has a criminal jurisdiction vested in it, to try certain crimes emerging in the course of any civil suit conducted before it. But their sentence in such cases is subject to appeal to the House of Lords.—*Carse v. His Majesty's Advocate, &c.* 26th July 1784, p. 1.

————— (2.) Held the Court of Session, having once granted an augmentation to a minister of the parish is not precluded from afterwards granting a second augmentation—this being within the jurisdiction and powers of modification conferred on the Court.—*Minister of Tingwall v. Officers of State*, 22d May 1789, p. 140.

JUS CREDITI.—By an antenuptial contract of marriage, it was provided that the children's provisions should be payable to them at the father's death, "and to bear interest from the majority or marriage of the said children." Held, in respect the father was bound to pay interest upon the sums so provided, from the time of the children's marriage or majority, that they had a *jus crediti*, and might have used diligence in their father's lifetime.—*Du Roveray v. Mackenzie, &c.*, 1st June 1795, p. 409.

JUS MARITI.—*Vide* Adjudications (2.)

JUS RELICTÆ.—*Vide* Widow's Terce.

LANDLORD and TENANT.—A tenant had a lease of the estate of Kilsyth for 99 years, at a rent of £500 per

annum. The tenant afterwards became creditor of the landlord to a large amount; £7282 of the debt being heritably secured over the estate on bond, which bore an express clause, entitling the tenant to retain the tack duty. Other debts also due to him were secured by an adjudication; and he contended, on the bankruptcy of the landlord, that he was entitled to retain the rent, in the first place, to pay the interest of his whole debts, and then to extinguish the principal. Held in the Court of Session, that he was entitled to retain the rents for the payment of the interest and principal of £7282 heritable bond, but not for the other debts. Reversed in the House of Lords, and held that the tenant was entitled to retain and impute the rents, in the first place, to pay the interest, and, in the second place, the principal of the *whole* debts due to the appellant as are preferable to the debts due to the other creditors.—*Campbell's Creditors v. The York Buildings Co.*, 11th May 1785, p. 32.

LEASE.— (1.) A tack stipulated that the tenant was at liberty to deviate from the mode of cropping and management laid down in his tack, upon his paying £2 per acre more of additional rent to the landlord. He departed from the mode of cropping; Held in the Court of Session that he was liable to pay the £2 of additional rent, but modified the same to a sum of £200. Reversed in the House of Lords, and case remitted to ascertain and determine specially, what was the number of acres the tenant became bound to cultivate in terms of the rules of cropping laid down in the tack, and what was the number of acres cultivated contrary to those rules.—*Stratton v. Graham*, 28th March and 12th May 1789, p. 119.

————— (2.) A lease, with a clause generally against subsetting, permitted the tenant to subset part of the subject, which was done accordingly. No rent was ever paid by the subtenant to the landlord, nor to the

tenant from whom he had his sub-lease, while there was a clause in the lease that the tenant should be liable in payment of the rents of the whole subject. The tenant failed, and an action of ejection being raised, and decree passed: Held, that the decree of removing was a good decree although only raised against the principal tenant, and clearly entitled the landlord to eject the subtenant from the part held by him.—*Grant v. Earl of Morton*, 8th June 1789, p. 145.

LEASE (3.) A lease let to two parties the whole slate quarries in the hill of Birnam. No mention was made in the lease of the slate quarries of Obney; but their predecessor in the lease (whose lease was in precisely similar terms to that of the respondents), had possessed the slate quarries of Obney as part of those of the hill of Birnam, and they took possession of these latter quarries as part of the subject, and wrought it without molestation for five years. Thereafter the landlord let the Obney quarries to Hepburn; Held, in a question raised, that the respondents were entitled to retain possession of the Obney quarries as a part of the subject of the lease, though not expressly mentioned therein; it being the understanding of the lessees that these were included in the bargain, and their possession for five years without objection being an homologation on the part of the landlord.—*Stewart, &c. v. Bells*, 12th April 1790, p. 158.

—— (4.) In a lease nothing was mentioned about the number of arable acres of land on the farm; but the tenant understood that there were, as had been represented to him, 600 acres of arable land; and as he was taken bound *expressly by the lease* to have always 300 acres in tillage for each year of the lease, which stipulation necessarily supposed that there were 600 acres of arable land, he insisted that the lease should be reduced and set aside in consequence of there not being that number of acres. The Court of Session dismiss-

ed the reduction, and held him liable for the rent: Reversed in the House of Lords; and lease reduced and set aside; and held him liable only at the rate of £450 per annum for the three years during which he had possessed the farm.—*Sir James Riddle, Bart. v. James Grosset*, 23d March 1791, p. 203.

LEASE (5.) A lease was taken to the tenant, his heirs and assignees, such assignees to be approved of by the landlord: On assigning the lease—Held that the landlord was not entitled to impose new and more ample conditions in his own favour in giving such consent or approval.—*Sir Alex. Ramsay Irvine, &c. v. Valentine*, 4th March 1793, p. 287.

—— (6.) A jotting or agreement was gone into with the tenant, while his former lease was not yet expired, for a thirty-eight years' lease of the farm after the expiry of the old. The landlord in the meantime died:—Held that his heir was not bound by this lease.—*Kerr v. Redhead*, 5th Feb. 1794, p. 309.

—— (7.) Held that a lease not completed in point of form, and in which no possession followed, was not good against a purchaser of the estate.—*M'Lean, &c. v. Cameron*, 27th April 1796, p. 474.

—— (8.) A lease was granted to a party, and his heirs and assignees, for nineteen years after the death of the lessee, and after the expiry of these nineteen years, for a *second* nineteen years, and after expiry of the second nineteen years, for the space of other nineteen years, and so forth from nineteen years to nineteen years, so long as the lessee and his heirs and successors should desire to possess. There was no definite ish. In a reduction of the lease by a singular successor, held the lease good.—*Scott v. Straton*, 13th May 1772, App. p. 666.

—— (9.) A lease provided that if two years rent ran into the third unpaid, the lease was to be forfeited. Four years rents fell due; in a reduction to set aside the lease, on this, among other grounds; The reasons

of reduction were repelled.—*Vide* above case.

LEASE—(10.) Held, by the terms of a lease of coal, which allowed the tenant to work the coal within the barony of Woolmet, excepting that part of it which lies within the parks, garden, and enclosures of Woolmet belonging to the appellant, that this exception did not entitle the appellant to sink pits and work the coal within the bounds so excepted; but was to be construed only as a clause to preserve the house and grounds from suffering injury from the general working of the coal by the respondents.—*Earl of Wemyss v. Sir Archibald Hope*, 24th Oct. 1796, p. 487.

——— (11.) A reduction of a lease granted, while a current lease had still many years to run, and made to commence forty-four years after its date, was brought on the ground of its being unequal and unfair in its terms, and the granter incapable from facility, and that fraudulent means had been taken to procure it.—Held, on proof, the lease to be bad.—*Sime v. Viscount Arbuthnott*, 27th Nov. 1797, p. 613.

LEGAL, EXPIRY OF;—*Vide* Adjudications (3.)

LEGITIM.—A Scotchman by birth left his country and settled in London, married an English lady, and acquired a fortune in trade there. He afterwards purchased the estate of Newliston in Scotland, to which he sometime thereafter retired, and died there. By his will his eldest son was left his whole heritable and moveable estate. The eldest daughter, the respondent, was married to Dr. Lashley, and on her marriage it was proposed to give her £2000 as *her fortune*. They retired to the West Indies, and a correspondence was entered into, by which £700 of this sum was paid them on bond, and further correspondence was entered into, regarding the balance, when the father died. The younger children had all discharged their father for their shares of the legitim, but the respondent had not discharged her

claim; and she therefore claimed not only her full legitim, but also a share of the goods in communion, as due at her mother's death:—Held, 1st. That she was not barred from homologation or acquiescence. 2d. That the claim of legitim was not excluded by Mr. Hog's settlement. 3d. That the marriage articles did preclude her from claiming a share of the goods in communion. 4th. That the renunciation of their shares by the younger children operated in favour of Mrs. Lashley. 5th. That the personal succession must be regulated by the *lex domicilii*, which was Scotland; and therefore included the funds both in England and elsewhere, and that the Government annuities were moveable.—*Hog v. Lashley, &c.* 20th April and 7 May 1792, p. 247.

LEX DOMICILII.—(1.) *Vide* above case.

——— (2.) *Vide* Domicile.

MANSE.—Held, where the presbytery had ordered an old manse to be pulled down, and a new one to be built, that they were not precluded from doing so, though the old manse might be repaired at a less expense than the cost of a new one; And also that the Presbytery was not limited by the act 1663 to the sum of £1000 Scots, but entitled to go beyond it, whatever the expenses might be.—*Mercer v. Williamson*, 17th March 1786, p. 43.

MAGISTRATES.—*Vide* Wrongous Imprisonment.

MALT DUTIES.—*Vide* Statutes.

MARRIAGE, CONSTITUTION OF—(1.)

Held, that though a party joins issue and goes to proof and final judgment on one fact of her condescence, that she is not foreclosed, on failure in making out that issue, from going to further proof of the other facts and circumstances of her condescence. So held in a declarator of marriage.—*M'Innes, &c. v. More*, 23d May 1785, p. 40.

——— (2.) Circumstances in which marriage was held to be established by co-habitation and acknowledg-

- ment.—Robertson v. Inglis, 14th Feb. 1787, p. 53.
- MARRIAGE, CONSTITUTION OF — (3.) — Circumstances in which written acknowledgment of each other as husband and wife, not seriously gone into on the part of the female, but immediately repented of, did not constitute marriage.—Kello v. Taylor, 16th Feb. 1787, p. 56.
- MARRIAGE SETTLEMENT. — Question, Whether a certain deed of obligation unilateral in its nature, and executed before marriage, was to have the effect and legal consequence of an antenuptial contract of marriage.—Sinclair, &c. v. Threipland, &c. 27th March 1789, p. 113.
- MASTER AND ASSISTANT.—Circumstances in which the Court of Session awarded damages to an apothecary's assistant, for an illegal and oppressive dismissal from service, by the son of his employer, without the employer's sanction and authority. Reversed in the House of Lords.—Macdonald v. Burt, 29th November 1796, p. 512.
- MEMBER OF PARLIAMENT. — (1.) Held, where objection is stated to the title to be enrolled, and to vote for a member of Parliament, the complaint must be followed up within four months, in terms of the act 16 Geo. II. c. 2.—Elliot v. Pringle, 5th March 1792, p. 237.
- Held, the eldest son of a Scotch peer ineligible to be elected a member to sit in the House of Commons —Lord Daer v. Hon. Keith Stewart, &c., 26th March 1793, p. 293.—*N.B.* This corrected by the Reform Act.
- MENTAL INCAPACITY.—*Vide* Reduction of Will.
- MISREPRESENTATION.—*Vide* Judicial Sale.
- MINORITY.—*Vide* Prescription, No. 4, et 5, et 6, et 7.
- NEGOTIATION et NEGLECT. — *Vide* Bill.
- NOTICE.—(1.) *Vide* Factor.
- (2.) *Vide* Burgh Election.
- NOTARIES ;—*Vide* Execution of Deeds by,
- NUISANCE.—*Vide* Use of Stream—Property.
- OPEN MARKET.—*Vide* Sale by Sample.
- PARTICEPS CRIMINIS. — *Vide* Proof (7.)
- PARTIES to be Called in an Action.—*Vide* Prescription (1.)
- PAROLE.—*Vide* Lease (4.)
- (2.) *Vide* Proof (4.)
- (3.) A contract in regard to a series of transactions regarding the sale of spirits, provided that "bills at three months date" should be paid for the delivery of each parcel of spirits. On failure to get these bills discounted in the bank,—circumstances in which parole proof of matters which passed at and subsequent to entering into the contract was allowed, so as to entitle the party to refuse going on with the contract.—Stein v. Stewart, &c., 18th April 1796, p. 462.
- (4.) Held that parole evidence was incompetent to prove a trust as to property held *ex facie* absolute. — Duggan v. Wight, 24th Nov. 1797, p. 610.
- PASSIVE TITLE. — *Vide* Gestio pro Hærede.
- PENALTIES.—*Vide* Pluris Petitio.
- PENALTY.—In a lease as to the mode of cropping, it was stipulated that if the tenant deviated from the rules of cropping laid down in the lease, he should pay £2 of additional rent per acre, not as a penalty, but as additional rent; Held that it was nevertheless to be considered as a penalty, and subject to modification by the Court, although it was argued that it was due *ex contractu*, and therefore not subject to modification.—Stratton v. Graham, 28th March and 12th May 1789, p. 119.
- PERSONAL RIGHT.—*Vide* Real Burdens.
- PERTINENT OF PROPERTY. — *Vide* Superior and Vassal.
- PLURIS PETITIO.—Circumstances in which held, where the termly penalties due by a bond were included in the accumulated sum of an adjudication, that these formed a *pluris petitio*; to the effect of reducing the same to a security for payment of the principal, and interest.—Nasmyth v. Samson, &c. 4th April 1785, p. 9.

POSSESSION.—*Vide* Lease (6.)

PRESCRIPTION (Negative).—(1.) The York Buildings Company had purchased the wood on a certain estate, and the greater quantity was delivered when they became bankrupt. Having lodged a claim on their estate, it was objected to the claim, that the contract had undergone the long negative prescription, and that the summons, decree, and horning, did not interrupt the prescription, because they were inept, from not calling the Company as a separate body, in which name it was appointed to sue and be sued by act of Parliament. Held in the Court of Session that these were sufficient to interrupt prescription. Reversed in the House of Lords, without prejudice to the points decided below; but with special remit to consider whether the contract as to the wood be now at this time in force.—*Grove and Others v. Sir James Grant*, 15th April 185, p. 17.

— (2.) Circumstances in which held that certain bonds due to creditors in England, by an English company, ranked on an estate in Scotland belonging to that company, had incurred the negative prescription of forty years. Reversed in the House of Lords.—*Delvalle, &c. v. York Buildings Co.*, 12th March 1788, p. 98.

— (Positive.) — (3.) Held that prescriptive possession on an adjudication, of which the legal was declared to be expired, but no charter and sasine had followed, did not give an absolute and irredeemable right to the property.—*Gillespie & Reid v. Hussey or Bogle*, 3d May 1793, p. 305.

— Negative. — (4.) Circumstances in which held that an entail, having lain dormant for more than forty years, was prescribed; and that the minority of a substitute heir of entail did not elide the plea of prescription.—*Black and Grant v. Gordon, &c.* 5th Feb. 1794, p. 317.

— (5.) *Vide* Clause (2.)

— (6.) Negative and Positive.

— In a question with a substitute

heir of entail, who brought an action of reduction and declarator of irritancy of the entail on the ground of contravention fifty years after the event, and who was a minor at the time of the alleged contravention. Held in the Court of Session that she might plead her minority as an exception to the title to exclude. In the House of Lords case remitted for consideration.—*Dalrymple v. Fullerton*, 18th Dec. 1797, p. 631.

— (7.) Circumstances in which a creditor having obtained adjudication against the estate of his debtor, with charter and infeftment thereon, followed by forty years' possession, had acquired an exclusive title by the positive prescription to the estate, and that the minorities pleaded were not sufficient to elide the plea.—*Ross v. Mackenzie*, 29th April 1776, App. p. 676.

— (Sexennial) (8.) Held, in counting the six years of the sexennial prescription, that the *terminus a quo*, in reckoning the period, is from the last day of grace after the bill falls due.—*Ferguson and Others v. Douglas, Heron & Co.* 11th Nov. 1796, p. 503.

— (Vicennial) (9.) Held that a charter and sasine which contained, by the error of the writer, a destination in terms different from their warrant were not inept, and that the service in special of the next heir was good, being protected by the vicennial prescription.—*Drummond v. Drummond, &c.* 26th April 1797, p. 557.

PRICE.—*Vide* Sale.

PRIVILEGES OF THE COLLEGE OF JUSTICE.—*Vide* College of Justice.

PROCESS.—*Vide* Proof.

— (2.) *Vide* Res Judicata.

PROPERTY.—(1.) Held it to be a settled point, that a whale being struck, and afterwards getting loose, is the property of the first striker who continues fast until she is killed; and that, from the evidence in this case, it appeared that the whale, when struck with the harpoon of the appellants' ship, had got free from the harpoon of the respondents', and

therefore, that the whale belonged to the appellants.—Addison & Sons v. Row, 3d March 1794, p. 334.

PROCESS (2.)—Stream.—(2.) Held that the proprietors of the Lochrin distillery had no right to throw refuse into the Lochrin burn from their distillery, to the injury of the other proprietors. In appeal, cause remitted to inquire if there was not a servitude over it.—Jameson v. Russell, 18th April 1792, p. 403.

—— (3.) A proprietor of a tenement within burgh, whose property is bounded by the sea flood, cannot acquire the vacant space of ground left by the sea between his property and the sea flood, such soil belonging to the magistrates of the burgh, for the benefit of the community.—Smart v. The Magistrates of Dundee, 22d Nov. 1797, p. 606.

PROOF.—(1.) A party held no vouchers or documents of debt for sums of money lent to his brother. The only evidence of these being some jottings in the brother's account book, and other separate accounts. Held that these were not sufficient evidence to support the claim made after the death of both.—Waddel v. Waddels, 20th Dec. 1790, p. 188.

—— (2.) *Vide* Witness, Re-examination of,

—— (3.) Held, that though a party joins issue, and goes to proof and final judgment on one fact of her condescendence, that she is not foreclosed, on failure of making out that issue, from going to farther proof of the other facts and circumstances of her condescendence; at least so held in the special circumstances of an action brought to establish marriage.—M'Innes v. More, 23d May 1785, p. 40.

—— (4.) In the reduction of the sale of an estate purchased at a judicial sale, in a ranking and sale before the Court, where the common agent was the purchaser, it was contended that the decree of sale, which declared that the sale was fairly gone into, as also the report to the Court of such sale

by the Judge Ordinary, upon which the decree had proceeded, ought not, as matter of concluded record, to be allowed to be redargued by parole proof. Held parole competent.—York Buildings Co. v. Mackenzie, 13th May 1795, p. 378.

PROOF.—(5.) *Vide* Witness.

—— (6.) *Vide* Parole.

—— (7.) In the course of a proof in an action of divorce against the wife, the party with whom she had adultery was adduced as a witness against her. Held him admissible as a witness. It was also objected to a slave that he was incapable of bearing testimony, he not being a Christian, or able to take the usual oath. The Court of Session ordered him to be examined on his creed. Both points affirmed in the House of Lords.—Nicolson v. Nicolson, 18th February 1771, p. 655.

PROVING THE TENOR.—Circumstances in which the special *casus amissionis* not having been proved, the action was dismissed.—Donald v. Donald, 8th April 1788, p. 105.

PROVISIONS TO CHILDREN. — *Vide* Jus Crediti.

QUALIFICATION FOR COUNCILLORS OF BURGHS.—*Vide* Burgh Election.

—— (2.) for Magistrates.—*Vide* Burgh Election.

—— (3.) for Voting.—Question Whether a certain conveyance of superiority of lands held under strict entail, conferred a substantial right of voting; or was a mere nominal and fictitious creation of a right, resorted to for the purpose of giving a right to vote for a member of parliament. — Hon. W. Elphinstone v. Campbell and Others, 30th April 1787, p. 77.

—— (4.) The Duke of Gordon granted a liferent superiority to Sir John Macpherson, then residing in India, and under this title his agents claimed to have him enrolled on the roll of freeholders. The statutory oath, devised to detect nominal and fictitious qualifications, was not put; but an objection was stated to his

being put upon the roll, on the ground that his title was fictitious and nominal. The court of freeholders put him upon the roll. On complaint to the Court of Session, he insisted to have certain interrogatories put to the claimant. Held it incompetent to put such interrogatories. Reversed in the House of Lords; and held that the statutory oath, which was not taken in this case, did not exclude such farther inquiry.—*Forbes v. Macpherson*, 19th April 1790, p. 169.

QUALIFICATION FOR VOTING. — (5.) Held, the valuation of the lands having been fixed by a decret of the Commissioners of Supply, the same must stand good, and entitle the proprietor to be enrolled as a freeholder of the county.—*Morehead v. Edmonstone*, 28th Feb. 1791, p. 199.

—— (6.) Held, although a deceased father had left his whole estate to trustees who were infest, that his heir was still entitled to be enrolled as possessing a good freehold qualification—the possession of the trustees being for his behoof, and their possession being considered his. *Speirs v. Sir Alexander Campbell, Bart.*, 5th March 1791, p. 201.

—— (7.) Held, where objection is stated to the title to be enrolled and to vote for a member of Parliament, the complaint must be followed up within four months in terms of the act 16 Geo. II. c. 11.—*Elliot v. Pringle*, 5th March 1792, p. 237.

RANKING OF CREDITORS.—*Vide* Landlord and Tenant.

—— (2.) Heritable Security, (1.)

—— (3.) *Vide* Relief among Cautioneers.

—— **AND SALE.**—(1.) Circumstances in which the mode adopted in valuing the estates for the purpose of fixing the upset prices at which the same was to be set up for sale, was unexceptionable, and objections repelled.—*Earl of Dundonald v. Bushby, &c.* 27th Dec. 1796, p. 528.

—— (2.) The teinds were repre-

sented in the memorial and abstract of a ranking and sale, and in the advertisements of an estate, to be valued and exhausted, and subject to no further burden. After the sale was completed, this was discovered, from a defect in the title, to be a mistake. Held that there could be no deduction from the price.—*Ferguson v. Mossman, &c.*, 17th Feb. 1797, p. 531.

RANKING AND SALE. (3.) Held that the common agent in a ranking and sale, cannot purchase the estates sold under the ranking for his own account, though at a public judicial auction, and sale reduced, though he had been in possession unchallenged for fourteen years.—*York Buildings Co. v. Mackenzie*, 13th May 1795, p. 378.

—— (4.) The common agent having applied to the Court for a warrant for £1000 of the York Buildings funds, to defray the expenses incurred, and to be incurred in certain processes, the Court granted warrant accordingly, though there was an appeal taken of those proceedings.—*York Buildings Co. v. Bremner*, 19th June 1797, p. 593.

—— (5) Decree in.—*Vide* Decree of Sale.

REAL BURDEN.—A trust deed was granted, conveying an estate for certain uses, but without declaring these uses real burdens upon the estate. A list of the debts, and the names of the creditors, for payment of whose debts the trust deed was granted, was made up and subscribed by the granter, with reference in the trust deed to this list as relative thereto, and a direction that it should be inserted in the register of sasines, along with the infestment to follow thereon, which was done accordingly. Held that these debts were not created real burdens on the estate.—*Chalmers, &c. v. Ross, &c.*, 1st June 1795, p. 417.

REDUCTION OF WILL.—Circumstances in which a will executed six days before death was reduced.—*Fyfe v. Williamson*, 10th March 1796, p. 478.

REDUCTION OF DEED.—Circumstances in which a will, conveying her whole moveable estate to a stranger, executed by a party impaired in memory and judgment, eighteen days before her death, was reduced.—*Pringle v. Dove*, 17th December 1796, p. 521.

—— Held that deeds granted by a person ninty-five years of age, subject to attacks of palsy, and where the memory was a good deal impaired, were sustained; the deeds having been executed several years before his death, and before these shocks and impaired memory had appeared.—*Rutherford or Scott v. Jerdons*, 23d Feb. 1791, App. p. 633.

REDUCTION OF LEASE.—*Vide* Lease (8) et (9.)

—— **DEEDS.**—*Vide* Solemnities to Execution of.

—— *Vide* Execution of, et Notaries.

RE-EXAMINATION OF A WITNESS.—*Vide* Witness, (4.)

RELEVANCY of Defence.—*Vide* Veritas Convicii.

RELIEF among Cautioners.—Three parties became bound, conjunctly and severally in a personal bond for the sum of £10,000, borrowed for the use of one of them; the other two being mere sureties, and having bonds of relief granted. The principal became bankrupt, and nothing could be derived from his estate. One of the sureties also became insolvent, and the other was obliged to pay the whole debt. Held that the latter was entitled to rank on his co-surety's estate for the whole debt paid by him, to the effect of recovering the one half due by him: Reversed in the House of Lords, and held that he was only entitled to rank for one half of the debt, each of them having been indebted as principal for the moiety thereof, and as surety for the other moiety.—*Keith v. Sir Wm. Forbes and Co.*, 11th June 1794, p. 350.

RELIEF AMONG HEIRS.—*Vide* Heirs (1.)

—— *Vide* Heirs (2.) et Res Judicata, (2.)

REMOVING.—*Vide* Lease (2.)

RENTS.—In a claim made by executors: Held that they were entitled to the arrears of rents due at the deceased's death; as also to one half of the year's rents for crop 1789, the deceased having died in September 1789.—*Earl of Fyfe v. Mackenzie, &c.*, 6th March 1797, p. 549.

RES JUDICATA.—*Vide* (1.) Lease (8.) A question of right in regard to a lease of coal having been disposed of by the Court of Session, and an appeal taken to the House of Lords, but never moved in: Held in a new action brought ten years thereafter, that these proceedings did not constitute a res judicata in bar of the action.—*Earl of Wemyss v. Sir Arch. Hope*, 24th Oct. 1796, p. 487.

RES JUDICATA.—(2.) The questions in this case were, 1st. Whether a deed executed by David Sinclair in 1716 was to be considered a marriage settlement. 2d. Whether the heir in possession was bound to keep down the interests of the debts on the estate during his possession; and, 3d. Whether it was competent to enter into these questions, the same being res judicata by a decree pronounced on them in 1763. Held by the Court of Session that the res judicata foreclosed. Reversed in the House of Lords, and remit to the Court to proceed.—*Sinclair v. Thriepland*, 27th March 1789, p. 113.

—— (3.) Circumstances in which it was held, that a decree pronounced was *res judicata*.—*Ross v. Mackenzie*, 29th April 1776, App. p. 676.

RESTITUTION.—*Vide* Sale.

RETENTION OF FEU-DUTIES.—*Vide* Superior and Vassal.

—— (2.)—Circumstances in which held, (reversing the judgment of the Court of Session) that bankrupts in England were entitled to rank on a bankrupt estate in Scotland, without the latter being entitled to set off against their claim bills of the bankrupts in England which they had held, but which they indorsed away for value, not being then holders thereof.—*Curtis, &c. v. Chippendale*, 23d Feb. 1797, p. 540.

RETENTION. — (3.) — The Royal Bank of Scotland found entitled to retain stock of an insolvent proprietor for payment of debts due to the bank by the Company of which he was a partner, against the trustee on the Company's bankrupt estate. — *Hotchkiss v. Royal Bank*, 28th Nov. 1797, p. 618.

SALE (1.) — Circumstances held not sufficient to set aside and void the sale, although the missives on one side expressly declared, that unless the titles were found sufficient, the bargain then made was to be null and void. — *Bruce v. Cleghorns*, 2d March 1785, p. 5.

—— (2.) — *Vide* Factor.

—— (3.) Thirty hogsheads of tobacco were bought on the eve of bankruptcy, and eight hogsheads delivered the day before the failure was known, but the twenty-two hogsheads not delivered; the bills stipulated for the price were not granted; and the seller insisted for return of the eight hogsheads. The bankrupts voluntarily returned them. Held, in a question with the creditors, that the seller was entitled to retain possession of the whole on emerging bankruptcy. — *Hill v. George and John Buchanan*, 11th April 1786, p. 47.

—— (4.) — Circumstances in which held, that a bargain for the sale of sugars was not finally completed, and that the seller, taking advantage of a rise in the price in the market, was at liberty to sell to another party. — *Duguid v. M'Cleish & Co.* 10th Feb. 1794, p. 320.

—— (5.) — A Distiller entered into a contract for the purchase of grain while on the eve of bankruptcy. The grain was purchased; and up to the actual date of the bankruptcy, between 20 and 30 cargoes stood thus: 1. The greatest quantity was delivered *more than three* days before bankruptcy. 2. Several cargoes were delivered within the three days of bankruptcy. And, 3d. At the date of his becoming bankrupt several cargoes had arrived at the port of delivery, but were not then landed,

but lay in the ships before being carried to the warehouse of the buyer. The sellers claimed restitution of the whole. In regard to the first, on the ground of presumptive fraud: In regard to the second, on the ground of positive fraud: And, in regard to the third, on the ground of their right to stop *in transitu* on emerging bankruptcy. 1. Held, that there were no circumstances inferring presumptive fraud, or fraud of any kind in this case; and that the fact of goods delivered within three days of bankruptcy is not *per se* a circumstance from which fraud may be inferred; and case remitted back to the Court of Session to take evidence, and hear parties further as to the point of stopping *in transitu*. — *Jaffrey and Others v. Allan, Stewart, & Co.*, 23d Dec. 1790, p. 191.

SALE (6.) — *Vide* Parole, (3.) case *Stein v. Stewart and Sommervail & Co.* 18th April 1796, p. 462.

—— (7.) — A corn merchant purchased from a farmer a quantity of grain by sample in public market; part of the grain was delivered, and bill granted for the price, and was paid. On failure of the tenant, held, in an action raised by the landlord against the corn merchant, that the latter must pay to him the value of the grain so delivered — the landlord having a right of hypothec over the same for the rent of which it was the crop. — *Smart v. Hon. Walter Ogilvy*, 26th Oct. 1796, p. 490.

—— (8.) In the reduction of a sale of an estate, held the purchaser entitled to claim, 1. Expense of making up titles. 2. The expense of planting shrubbery and trees. 3. Expense of building a mansion-house and offices at Port Seton, as items beneficially expended and permanent improvements. — *York Buildings Company v. Mackenzie*, 14th June 1797, p. 579.

SEA SHORE. — *Vide* Property. (3.)

SERVITUDE (1.) — *Vide* Property of Stream.

—— (2.) — Circumstances in which a servitude of peat and a servitude of cart road were sustained. — *Ding-*

wall v. Farquharson, 31st May 1797, p. 584.

SETTLEMENT, MARRIAGE.—A deed not of the nature either of an antenuptial or post nuptial contract of marriage, but unilateral, contained absolute warrandice, that the provisions therein “should be good, “valid, and sufficient to the heirs “respective of the said marriage, and “against all deadly,” and it was maintained, in regard to this deed, that it was not in the power of the granter to defeat this settlement by any voluntary gratuitous deed, because by it there was a *jus crediti* in the parties favoured. Held, in the House of Lords, that the deed had not the effect of a marriage contract.—*Sinclair v. Thriepeland, &c.* 27th March 1789, p. 113.

SOLEMNITIES Necessary in the Execution of Deeds.—Certain deeds having been executed by a person blind, and partly deaf, by the aid of notaries; and the deeds not having been read over to him in such a way as to make him understand or to be heard; nor read over to him in the presence of the witnesses, nor any mention made in the notaries docquet that they were so read. Held the deeds void.—*Lowthian v. Maxwell*, 11th June 1794, p. 365.

SUBSTITUTION, or Conditional Institution.—A party, by his trust deed, left the residue of his estate to his five grandchildren equally among them, declaring that the share of any one deceasing should accresce to the survivors. Also that these shares should become payable to them on their attaining the age of 25 years, when the trustees should be bound to pay the same with interest. Cecilia, one of those grandchildren, survived her grandfather, and also the age of twenty-five, but, in consequence of mental weakness, her share had been allowed to remain in the trustees' hands unpaid. She died, leaving a brother, Samuel Stevenson: Held, that the substitution in favour of the surviving grandchildren did not take effect, and her brother preferred to her share.—

Grahams, &c. v. Russel, Stevenson's Trustee, 1st April 1791, p. 210.

SUBSTITUTE HEIR OF ENTAIL.—*Vide* Minority and Prescription.

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SUE, Title Necessary to.—Held that burgesses not being also councillors of the burgh, were not entitled to carry on a suit to set aside the election of the magistrates and town councillors of the burgh.—*Miller &c. v. Thomson and Others*, 26th April 1785, p. 21.

———— (2.) Held that every copartnery must, from its nature, subsist after its dissolution, to the effect of winding up its affairs, supposing there was no provision in the contract to this effect; but, in the present case, there was in the contract a special provision for this purpose, and therefore that the title to sue in the social name of a dissolved company, in such circumstances, was unexceptionable.—*Gordon v. Douglas, Heron & Co.*, 24th Dec. 1795, p. 428.

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